TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 22

EVELYN C. GARDNER, PETITIONER,

vs.

PANAMA RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 27, 1951.

CERTIORARI GRANTED MAY 21, 1951.

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[fol. 1]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE, DIVISION OF BALBOA

No. 2097. In Admiralty

EVELYN C. GARDNER, Libelant,

-versus

PANAMA RAILROAD COMPANY, a Corporation, Respondent.

Appearances:

Van Siclen, Ramirez & de Castro, Proctors for Libelant. Box 945, Ancon, Canal Zone.

Paul A. Bentz, Paul M. Runnestrand, David J. Markun, Proctors for Respondent. Balboa Heights, Canal Zone.

LIBEL—Filed October 19, 1949

To the Honorable Joseph J. Hancock, Judge of the United States District Court for the District of the Canal Zone:

The libel and complaint of Evelyn C. Gardner, against the Panama Railroad Company, a corporation, in a cause of [fol. 2] tort or damage, civil and maritime, respectfully represents that:

1. The libelant, Evelyn C. Gardner, is a citizen of the United States of America and resides on the Canal Zone and within the Balboa Division of this Court.

2. The respondent, the Panama Railroad Company, is a corporation incorporated and existant by virtue of the laws of the United States, as of June 29, 1948; that prior to June 29, 1948, the respondent was a corporation incorporated and existant by virtue of the laws of the State of New York; that the respondent is a resident of the Southern District of New York and of the Canal Zone; that respondent is licensed and does business on the Canal Zone; that respondent maintains an office and place of business within the Canal Zone and within the Balboa Division of this Court.

3. That the respondent did, on or about the 3rd day of December, 1947, own, maintain, and operate under the American flag, as a common carrier of passengers and freight, a certain steamship denominated the S. S. Panama;

4. That prior to the 3rd day of December, 1947, the libelant purchased passage on the S. S. Panama for carriage of her person as a passenger from New York City to Cristobal, Canal Zone; that by virtue of the aforesaid purchase, the libelant boarded the S. S. Panama at New York City, on December 3, 1947, on which date the said ship, with the libelant on board, departed from New York City for *Cristobal*, Canal Zone.

[fol. 3] 5. That on the 3rd day of December, 1947, the libelant was in the bathroom of the stateroom numbered 108, assigned to her on board the S. S. Panama by the purser, which purser at the time acted in his capacity and within the scope of his authority, and in the furtherance of his duties as an employee of the respondent; that the said vessel was on the high seas; that the ship lurched suddenly; that the sudden lurch of the ship disequilibriated the libelant and she shifted her footing to regain her equilibrium; that as the libelant shifted her footing, as aforesaid, the heel of the shoe which libelant wore on her right foot struck a coaming 5¾ inches high adjacent to the place where the toilet bowl joined the floor, which coaming separated the floor of the shower compartment from the rest of the bathroom, and which coaming and shower compartment were obscured from the libelant's vision by a shower curtain; that the libelant was catapulated into a sitting position in the shower compartment and her head struck the wall of the said compartment; that in the course of the libelant's fall she grasped at the wall of the bathroom for support; that she failed to grasp the flat surface of the wall and grasped the shower curtain which was drawn completely across the opening into the shower compartment, as aforesaid, which shower curtain gave way with libelant's weight and failed to impede the libelant's fall.

6. That the fall of the libelant as aforesaid, was proximately caused by the negligence and carelessness of the respondent in that it maintained the said bathroom with 5¾ inch coaming on the floor, adjacent to the area necessary for the libelant or other users of the bathroom to stand while flushing the toilet, and that it maintained the bathroom in such a manner that the shower curtain obscured the coaming and entrance to the shower compartment when [fol. 4] drawn across the entrance to said compartment and in that it maintained the said bathroom without an

adequate distribution of grips for the purpose of manual support against disequilibration due to the movements of the ship upon the sea.

7. That because of the libelant's fall, as aforesaid, and proximately as a result of the negligence of the respondent, as aforesaid, the libelant suffered a ruptured cartilage disc in the area of her spine and suffered pain continuously from the 3rd day of December, 1947, until the present, to her damage in the sum of $10,000.

8. That because of the libelant's fall as aforesaid, and proximately as a result of the negligence of the respondent, as aforesaid; the libelant necessarily underwent medical treatment, hospitalization and a surgical operation to her damage in the sum of $117.00.

9. That on the 3rd day of December, 1947, and for several years prior thereto, the libelant was employed as a Court reporter and public stenographer with an income of $3,600.00 per year.

10. That because of the libelant's fall, and proximately as a consequence of the negligence of the respondent, the libelant was incapacitated from attendance to her work and employment from the 3rd day of December, 1947, up to and including the 23rd day of May, 1949, to her damage in the sum of $10,000.00.

Wherefore, libelant prays:

(a) That process in due form of law, according to the rules and practice of this Honorable Court, in causes of [fol. 5] admiralty and maritime jurisdiction, may issue against said respondent, Panama Railroad Company, a corporation, citing them to appear and answer, on oath, all and singular, the matters aforesaid;

(b) That after due proceedings had, this Honorable Court may be pleased to decree to libelant, and against respondent, Panama Railroad Company, a corporation, the damages suffered by libelant as aforesaid, with interest and costs and disbursements;

(c) That libelant have such other and further relief as in law and practice it may be entitled to receive.

Van Siclen, Ramirez & de Castro, (Signed) by Woodrow de Castro, Proctors for Libelant.

Duly sworn to by Evelyn C. Gardner. Jurat omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

PLEA TO THE JURISDICTION OF THE SUBJECT MATTER—Filed November 23, 1949

The Honorable Judge of said Court:

For its plea to the jurisdiction of the Court over the subject matter in this cause of tort or damage, civil and maritime, respondent alleges as follows:

I

No cause of action in admiralty arose against the respondent from the injuries alleged in the libel herein, since, at the time of the injuries complained of, the Federal Tort Claims Act [now reenacted as secs. 2671-2680, and sec. 1246(b) of Title 28, U. S. Code] provided the exclusive judicial remedy for personal injuries caused by the negligence or wrongful act or omission of any officer or employee of the Panama Railroad Company.

II

This Court squarely held in the earlier civil action brought by libelant herein, as plaintiff therein, on essentially the same allegations of fact (Evelyn C. Gardner vs. The Panama Railroad Company, Civil No. 2807) that under section 423 of the Tort Claims Act [now reenacted by Congress as sec. 2679 of Title 28 U. S. C.] the Panama Railroad Company, being an agency of the United States Government, was not suable for torts committed by its officers and employees, and that any action for such torts was maintainable only against the United States in so far as permitted by the Tort Claims Act. Accordingly, plaintiff's civil action was dismissed by judgment of this Court dated October 7, 1948.

[fol. 7] III

The present suit, proceeding in admiralty, is no more maintainable against respondent than was the aforesaid civil action (Civil No. 2807), since under section 423 of the Tort Claims Act [now reenacted as sec. 2679 of Title 28, U. S. C.] suits on tort causes of a type cognizable under

the Act, which theretofore could have been brought against the respondent in proceedings in admiralty were, after the passage of that Act and at the time of the libellant's alleged injury, maintainable only against the United States under the provisions of said Act, for the reasons hereinbelow developed.

IV

It is clear that from and after August 2, 1946, the date of approval of the Tort Claims Act, suit on any claim cognizable under that Act can be brought only against the United States, in accordance with the terms of that Act, unless such claim is of a type specifically excepted by section 421 of that Act [now 28 U. S. Code, sec. 2680]. See Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

V

That the claim upon which this libel is based is one which is cognizable under the Federal Tort Claims Act has been settled beyond dispute by this Court's ruling in Evelyn C. Gardner vs. Panama Railroad Company, Civil No. 2807, and in Evelyn C. Gardner vs. The United States, Civil No. 2930, both of which actions were founded on essentially the same allegations of fact as those which form the basis for the present libel. In Gardner vs. The [fol. 8] United States, which action was brought under the Tort Claims Act, this Court's jurisdiction was not even questioned until after the enactment of Public Law 172—81st Congress, 1st Session, approved July 16, 1949, which amended the Tort Claims Act so as to except therefrom "* * * Any claim arising from the activities of the Panama Railroad Company." That amendment, of course, served to divest the Court of jurisdiction, and this Court so ruled, dismissing the case for lack of jurisdiction by Judgment dated October 14, 1949.

VI

It is equally clear that claims which prior to the Tort Claims Act were cognizable against the respondent in proceedings in admiralty were nowhere excepted from that Act prior to the enactment of said Public Law 172.

While subsection 421(d) [now reenacted as sec. 2680(d) of Title 28 U. S. C.] exempts

"(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States,"

that subsection does not exclude from the Tort Claims Act claims theretofore cognizable in admiralty against the respondent, since sections 781-790 of Title 46, U. S. Code, the Public Vessels Act, obviously do not apply to the respondent since it cannot be contended that respondent's vessels are "public vessels," i.e., vessels owned by the United States which are not engaged in trade or commerce, and, since section 741 of Title 46, U. S. Code, specifically exempts the respondent from the Suits in Admiralty Act [secs. 741-752 of Title 46, U. S. Code], in the following terms: "* * * Provided, That this chapter shall not apply to the Panama Railroad Company. * * *."

[fol. 9]

VII

There is no other exception contained in section 2680 of Title 28 of the U. S. Code which could reasonably be construed to except the claim upon which the present libel is founded from the Tort Claims Act. It follows that no cause of action against the respondent, in admiralty or otherwise, ever arose in favor of the libelant on the basis of the facts alleged by the libel herein.

VIII

That claims which prior to the Tort Claims Act were cognizable against the respondent by proceedings in admiralty were, after the passage of that Act, cognizable exclusively by actions against the United States under that Act, is further apparent from the legislative history of the above mentioned Public Law 172. House Report No. 830 on S. 1168, which was enacted as Public Law 172, contains the following language on page 4 thereof, quoting a letter from the Secretary of the Army to the Chairman of the House Committee on the Judiciary:

"Under title 28, United States Code, section 2679, the authority of a Federal agency to sue and be sued may no longer be construed to authorize suits against such agency

on claims on which suit is authorized by the Federal Tort Claims Act, and the remedies provided by the act are made exclusive. Although the act is made inapplicable to claims for which a remedy is provided by the Suits in Admiralty Act, the exclusion of the Panama Railroad from the coverage of that act operates to bring within the scope of the Tort Claims Act maritime claims against the Company which are not within the coverage of the Tort Claims Act as applied to other Government agencies. In addition, the provisions of the Federal Tort Claims [fol. 10] Act making exclusive the remedies provided by that act nullifies the application to employees of the Panama Railroad Company of the provisions of the Jones Act, the Longshoremen and Harbor Workers' Compensation Act, and the Federal Employers' Liability Act, thereby depriving such employees of the procedural and substantive benefits of such legislation representing policies of the Congress developed over a long period of years in reference to the handling of claims for injuries by employees in the maritime and railroad industries.

"The substitution of the Federal Tort Claims Act for the remedy provided by the Jones Act eliminates the injured seamen's choice of forum as between State and Federal Courts, and his right to jury trial, and substitutes a 1-year period of limitation for the 3-year period applicable under the Jones Act, thereby placing the seaman employed by the Panama Railroad Company in a comparatively disadvantageous position in reference to seaman employed on privately owned and operated vessels. These departures from the established policy of the Congress in reference to maritime and railroad employees appear not to have been within the contemplation of the Congress in the enactment of the Federal Tort Claims Act and further appear to be foreign to the general purposes of the act." (Emphasis added.)

IX

The enactment of Public Law 172-81st Congress, 1st Session approved July 16, 1949, which by specific amendment of section 2680 of Title 28, U. S. Code, excepts from the Tort Claims Act claims arising from the activities of the Panama Railroad Company, does not, of course, serve [fol. 11] to give libelant a cause of action against the respondent where no such cause of action existed at the

time the alleged injuries were sustained, since the effective date of said Public Law 172 must be presumed to be the date of its approval, there being no other effective date specified in the Act.

It is settled law that a statute takes effect from the time of its passage where no effective date is expressly fixed (Matthews vs. Zane, 20 U. S. 164, 7 Wheat. 164, 5 L. Ed. 425 (U. S. Ohio, 1822); Warren Mfg. Co. vs. Etna Ins. Co., Fed. Cas. No. 17,206, 2 Payne 501 (C. C. Conn., 1832). See generally cases cited in section 255 of Title 59 (Statutes) of the Federal Digest at page 634, et seq. Under section 7 of Article 1 of the United States Constitution, providing that every bill after passing the House of Representatives and the Senate shall, before it becomes a law, be presented to the President, and if he approves it he shall sign it, a bill takes effect as law the time of such approval by the President. In re Richardson, Fed. Cas. No. 11,777, 2 Storey 571, 6 Law Rep. 392 (C. C. Mass. 1843); Bristol Mfg. Corp. vs. U. S., 2 Fed. Supp. 781 (Ct. Cl. 1933).

The general rule that statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed, is well settled. Brewster vs. Gage, 50 Sup. Ct. 115, 280 U. S. 327, 74 L. Ed. 457. See generally cases cited under section 263 of Title 59 (Statutes) of the Federal Digest at page 637 et seq. The United States Supreme Court has held that laws are not to be construed as applied to cases which arose before their passage, unless that intention be clearly declared. Shwab vs. Doyle, 42 Sup. Ct. 391, 258 U. S. 529, 66 Lawyers' Ed. 747, 26 A. L. R. 1454. It has been held that retroactively, even where permissible, is not favored [fol. 12] except on the clearest mandate. Claridge Apts. Co. vs. Commissioner of Internal Revenue, 65 Sup. Ct. 172, 232 U. S. 141, 89 L. Ed. 139. There is an almost conclusive presumption against the power to take retroactive action under a statute unless Congress plainly specifies such power. Trans. & Western Air vs. Civil Aeronautics Board, 169 Fed. 2d 893, 83 U. S. Ap. D. C. 358 (C. A. D. C. 1948). A statute, to be construed as operating retrospectively, must not only clearly appear to so operate, but its retrospective character must be derived from the unequivocal import of the terms and manifest intention of the legislature U. S. vs. McKinney, 107 Fed. 2d 879 (C. C. A. Ohio,

1939). This rule against the retroactive application of statutes applies fully as strongly to amendatory Acts as it does to statutes generally. Dodge vs. Nevada National Bank of San Francisco, 109 Fed. 726, 48 C.C. A. 626 (C. C. A. Cal., 1901), holding that an amendatory Act could not be given retroactive effect in the absence of language so declaring, even though it was the intention of the supporters of the bill that it should operate retroactively.

X

Briefly summarized, the position asserted by the respondent in this plea to the jurisdiction is:

(1) That no cause of action, at law or in admiralty, ever existed against the respondent Panama Railroad Company on the basis of libelant's alleged injuries on or about December 3, 1947, because (a) at that time any cause of action arising therefrom either at law or in admiralty was necessarily and exclusively against the United States under the Tort Claims Act; and (b) Public Law 172, 81st Congress, approved July 16, 1949, excluding the Panama Railroad Company from the Tort Claims Act, has pro-
[fol. 13] spective effect only and does not retroactively create any cause of action against the respondent and, of course, could not "revive" a cause of action that never existed.

(2) That this Court's decision of October 7, 1948, supporting the above position specifically as to the nonexistence of any action at law against the respondent (Civil No. 2807, Evelyn C. Gardner vs. Panama Railroad Company), is controlling in all respects as to the present attempt to assert the same cause of action in admiralty, since admiralty proceedings against the Panama Railroad Company were not excepted from the Tort Claims Act and any such cause of action in admiralty against the Company, as in the case of the attempted tort action at law as held in Civil No. 2807, was therefore cognizable under the Tort Claims Act, which furnished the exclusive remedy and negatived the existence of any cause of action against the Panama Railroad Company.

XI

Wherefore, the premises considered, the respondent prays the Court that the libel herein be dismissed.

(Signed) Paul A. Bentz, Paul M. Runnestrand, David J. Markun, Proctors.

Duly sworn to by Paul A. Bentz. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

FINDINGS ON EXCEPTIONS TO ANSWER IN ADMIRALTY—Filed February 13, 1950

This action in Admiralty by Evelyn C. Gardner against Panama Railroad Company is based upon the claim by libelant that while she was a passenger on a ship owned and operated by respondent, that through the negligent maintenance of the bathroom which was a part of her stateroom she sustained certain alleged personal injuries. Prior to the institution of the above admiralty proceedings, and on April 10, 1948, Action No. 2807 was instituted in this Court and in common law against the Panama Railroad Company. The Panama Railroad answered, pleading that it was an instrumentality or agency of the United States, and under and by virtue of an Act of Congress approved August 2nd, 1946 (known as the Federal Tort Liability Act) that the United States had consented to suit on claims on account of personal injury caused by negligence or wrongful act or omission of any employee of the Panama Railroad Company, or Federal Agency of the United States, and that such act had superseded any right of action against the Panama Railroad Company.

[fol. 15] Against this plea a motion to strike was directed. The motion to strike was overruled under authority of Wickman vs. Inland Waterways Corporation, 78 Federal Supplement 284. Thereafter, the plaintiff declining to plead further, the action was dismissed with the expressed views that under the provisions of the Federal Tort Liability Act the Court was without jurisdiction over the Panama Railroad Company.

On November 29, 1948, Evelyn C. Gardner, now libelant in this Admiralty Proceeding, instituted under the Federal

Tort Liability Act her action against the United States. Answer was filed, joining issue, without being assigned for trial. On July 16, 1949, Congress amended the Federal Tort Liability Act by inserting as an additional exception to the application of such Act sub-paragraph "M", which amendment excepted from the operation of that Act any claim arising from the activities of the Panama Railroad Company. On September 14, 1949, a motion for dismissal was filed. On October 14, 1949, that motion was sustained, the basis being lack of jurisdiction.

This Action in Admiralty was filed October 19, 1949, against the Panama Railroad Company. A plea to the jurisdiction of the Admiralty proceedings was filed, asserting that on December 3, 1947, the date of the alleged occurrence of libelant's claimed injuries, that the only remedy then existing for enforcing the libelant's cause of action was that prescribed and provided for by the Tort Liability Act, and that under and by virtue of Chapter 340, Public Law, 172, approved July 16, 1949, that the exemptions or limitations contained in the Tort Liability Act were amended, excluding from the operation of the Act any claim arising from the activities of the Panama Railroad Company; and that by reason of that amendment [fol. 16] there was withdrawn from libelant all remedies or proceedings for enforcing her cause of action as against the United States, and none exists for enforcing libelant's cause of action against the Panama Railroad Company.

It cannot be questioned but that under the Tort Liability Act as originally enacted, and prior to the amendment approved July 16, 1949, that the remedy for enforcement of libelant's cause of action was confined exclusively against the United States. However, under that amendment, all remedies or proceedings against the United States under that Act in reference to Panama Railroad Company were withdrawn. The right of the United States to withdraw at any time its statutory waiver of its sovereign immunity from suit cannot be questioned, and this result raises the question whether by reason of such withdrawal, in reference to suits against the Panama Railroad Company, and a restoration to the United States of such immunity, restored to libelant the remedy of enforcing her pre-existing right against the Panama Railroad Company.

Libelant's injuries, received while she was on a vessel owned and operated by the Panama Railroad Company, and inflicted through some alleged negligent failure of the Railroad, constituted an invasion of the primary rights of libelant, thereby vesting in libelant an election of proceedings to enforce that right, if in law or by statute there is a remedy provided by which it may be pursued to preserve to a litigant the relief to which he is entitled. This invasion of a primary right is often referred to as a "right of action." As stated in Dennison vs. Payne, 293 Federal Reporter 333-343:—

[fol. 17] "The cause of the injury upon which the right of action is founded is not the cause of action itself, but is only one element in the cause of action. Chief Justice Fuller in Chesapeake & Ohio Ry. Co. vs. Dixon, 179 U. S. 131-139, defined the phrase 'cause of action' saying that it 'manifestly' comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to 'traverse'. A cause of action comprehends the primary right possessed by the plaintiff, and the corresponding primary duty resting upon the defendant in breach of such primary right and duty. The cause of action is something distinct from the remedy or the relief sought. The remedy is simply the means by which the cause of action is satisfied. Volume 1, American Jurisprudence, Page 405, Section 3."

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. (Baltimore S. S. Co. vs. Philipps, 274, U. S. 316).

The Court in the above case, quoting from the case of Chobanian vs. Washburn Wire Co., 33 P. I. 289-80 A. 394. Amm. Cases 1913 D. 730 said:—

"The facts are merely the means and not the end. They do constitute the cause of action, but show its existence by making the wrong appear. The thing, therefore, which in contemplation of law, as its cause, becomes a ground for action, is not the group of facts alleged in a declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince."

Adopting the above referred to rules of law as the correct law governing the claim of libelant, upon libelant

[fol. 18] being injured there was acquired a vested right of action in favor of libelant and against the one invading that primary right. If libelant's right of action had accrued prior to the passage of the Tort Liabiliay Act, libelant's remedy for enforcing her right would have been against the Panama Railroad. However, that remedy had been changed by an Act of Congress in 1946, which is referred to as the "Federal Tort Claims Act." Under that Act, which was existing at the date on which libelant's claimed injuries occurred, the United States waived its sovereign immunity from suit on "claims based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not either valid, or based upon the exercise or performance, or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused." In addition to such waiver of immunity, the procedure or remedy for the enforcement of such claims is provided for as follows:

"From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under Part 3 of this title, and the remedies provided by this title in such cases shall be exclusive."

Prior to the amendment approved July 16, 1949, it appearing that a majority of the stock of the Panama being owned by the United States, and whose corporate functions were those of an agency of the United States, it was held that such circumstances brought the Panama Railroad Company within the statutory definition as a "Federal agency."

[fol. 19] By reason of that statutory classification, the remedy of libelant to proceed against the Panama Railroad Company was taken, and in lieu thereof a remedy was provided which limited libelant to the exclusive remedy of proceeding against the United States only.

Before libelant's rights could be adjudicated under the remedies provided for under the Federal Tort Liability Act, and as against the United States, the Secretary of the Army, with the concurrence of Hon. Douglas McGregor, the Assistant to the Attorney General, directed letters to

the Judicial Committee recommending that the Federal Tort Liability Act be amended so as to exclude therefrom claims against the Panama Railroad Company, (See Legislative History of 81st Congress, House Report No. 830, of June 15, 1949, as enacted under Public Law 172). Upon that recommendation, Congress amended the Federal Tort Liability Act by addition to the exceptions from application of such act of paragraph "M", which was approved July 16, 1949, and is as follows:—

"Section 2680 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

"(M) Any claim arising from the activities of the Panama Railroad Company."

Under the above amendment the remedy of libelant to prosecute her right of action against the United States was withdrawn.

The Court is of the opinion that from the time of libelant's alleged injuries there was a vested right of action; that the enactment of the Federal Tort Liability Act did not divest libelant of her right of action; that the existing [fol. 20] remedies for the enforcement of her right of action was only enlarged under the Federal Tort Liability Act! and that upon the withdrawal of that remedy and before her right of action was adjudicated, libelant's remedy under the common law to proceed against the Panama Railroad Company was reestablished, and now exists.

Respondent's plea to the jurisdiction is denied, and the motion to dismiss is overruled.

Dated: Feb. 13, 1950.

(S) Joseph J. Hancock, Judge.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING RESPONDENT'S MOTION TO DISMISS—Filed February 15, 1950.

This cause having come on for hearing on January 5, 1950, on Respondent's plea to the jurisdiction of the subject matter and motion for dismissal of the action, and the Court having heard the arguments of Counsel for the respective parties, and having ordered the case continued

pending the filing of briefs, and briefs having been filed by the respective parties, and the cause having been submitted to the Court on January 26, 1950, and the Court having considered the briefs and the authorities cited by both parties, and having considered the other pleadings and motions heretofore filed herein, it is hereby

Ordered, Adjudged, And Decreed, that Respondent's plea to the jurisdiction of the subject matter be denied and [fol. 21] Respondent's motion for the dismissal of the action be overruled.

Dated: February 15, 1950.

(S) Joseph J. Hancock, Judge.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 27, 1950.

To the Honorable Judge of said Court:

For its Answer to the libel of Evelyn C. Gardner, in a cause of tort or damage, civil and maritime, the respondent, Panama Railroad Company, alleges on information and belief as follows:

First: Respondent admits the allegations contained in the first paragraph of the libel.

Second: Respondent admits the allegations contained in the second paragraph of the libel.

Third: Respondent admits the allegations contained in the third paragraph of the libel.

Fourth: Respondent admits the allegations contained in the fourth paragraph of the libel.

Fifth: Respondent admits that Stateroom 108 of the SS Panama was assigned to libelant by the ship's purser, who in doing so acted in that capacity and within the scope of his authority, and in the furtherance of his duties [fol. 22] as an employee of the respondent; admits that the said vessel was on the high seas on the 3rd day of December, 1947; and admits that a coaming 5¾ inches high separated the floor of the shower compartment from the rest of the bathroom of said stateroom. Respondent denies that the coaming was obscured from libelant's vision by a shower curtain. Except as above admitted or denied, respondent

is without knowledge or information sufficient to form a belief as to the allegations contained in the fifth paragraph of the libel, and therefore denies such allegations.

Sixth: Respondent admits that there was located in the bathroom of Stateroom 108 of the SS Panama at the time of the alleged injuries a coaming 5¾ inches high surrounding the shower area of said bathroom. Except as above admitted, respondent denies the allegations contained in the sixth paragraph of the libel.

Seventh: Respondent denies the allegations contained in paragraph seven of the libel.

Eighth: Respondent specifically denies that the libelant's fall was proximately caused as a result of any negligence of the respondent, and specifically denies that there was any negligence of the respondent. Except as above denied, respondent is without knowledge or information sufficient to form a belief as to the allegations contained in the eighth paragraph of the libel, and therefore denies such allegations.

Ninth: Respondent is without knowledge or information sufficient to form a belief as to the allegations contained in the ninth paragraph of the libel, and therefore denies such allegations.

[fol. 23] Tenth: Respondent specifically denies that the libelant's fall was proximately caused as a consequence of any negligence of the respondent, and specifically denies that there was any negligence of the respondent. Except as above denied, respondent is without knowledge or information sufficient to form a belief as to the allegations contained in the tenth paragraph of the libel, and therefore denies such allegations.

Eleventh: Further answering the libel, and as a complete defense thereto, respondent alleges that libelant's alleged injuries were not caused or contributed to by any fault or neglect of the respondent but were caused instead solely by libelant's own negligence in that, among other things:

(a) Libelant knew or should have known that the seas were rough at the time of the alleged injuries;

(b) Libelant stood up to flush the toilet when she could have remained seated while doing so; and

(c) Libelant did not avail herself to the supports and handholds which were available for use in the bathroom and which were easily within her reach from either a sitting or a standing position.

Twelfth: Further answering the libel and as a separate defense thereto, respondent alleges that, assuming without admitting any negligence on the part of the respondent, libelant's alleged injuries were proximately contributed to by libelant's own negligence in the same respects alleged by respondent in the next preceding paragraph of this answer.

[fol. 24] Thirteenth: Further answering the libel and as a separate and complete defense thereto, respondent alleges that libelant knew, or in the exercise of ordinary care should have known, the state of the seas and the movements of the vessel, and the condition of the bathroom in libelant's stateroom, and knew, or in the exercise of ordinary care should have known, the hazards and risks incident to her moving or standing within said bathroom in view of such known facts, and libelant voluntarily assumed such hazards and risks.

Fourteenth: Further answering the libel and as a separate and complete defense thereto respondent alleges that the same is barred by the admiralty doctrine of laches, it appearing on the face of the libel that this suit was commenced more than one year after the date of the alleged injuries, and the applicable statute of limitations in tort causes of action in the Canal Zone being one year, as prescribed by subsection 3 of section 87 of title 4 of the Canal Zone Code.

Fifthteenth: That all and singular the premises are true.

Wherefore, respondent prays that the libel herein be dismissed with prejudice, that libelant take nothing from respondent in this suit, and that the respondent have judgment for its costs and disbursements herein.

Paul A. Bentz, Paul M. Runnestrand, David J. Markun, (Signed) By Paul A. Bentz, Proctors for Respondent.

Balboa Heights, Canal Zone.

[fol. 25] *Duly sworn to by F. K. Newcomer. Jurat omitted in printing.*

[fol. 26] IN UNITED STATES DISTRICT COURT

MINUTES OF MARCH 9, 1950

This case coming on regularly for the purpose to hear oral arguments of proctors on the question of laches, the libelant appears by proctor Woodrow de Castro, and the respondent appears by proctor David Markun.

Proctors for the parties orally stipulate that the purpose of the hearing at this time is only on the question of laches, and further orally stipulate that Civil Cases No. 2807 and 2930 of record in this Court are made a part of this record only on the question of laches. The Court thereupon directs proctors for the parties to file a written stipulation herein.

The Court having heard the statements and arguments of proctors, Orders that the issue as to laches will be submitted to the Court upon the filing of the written stipulation by proctors.

Proctor for Respondent files a brief in support of the prayer for dismissal on the ground of laches. Proctor for libelant states that he will file his brief or authorities within the next few days.

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed March 13, 1950

It is hereby stipulated by and between Woodrow de Castro, of proctors for libelant, and David J. Markun, of proctors for respondent that the issues of law and fact raised in, and by virtue of, the Fourteenth paragraph of [fol. 27] respondent's answer to the libel filed herein be tried separately and apart from the other issues, both of law and fact, raised by the pleadings, and that the said issues raised by the Fourteenth paragraph of respondent's answer be heard by the Court on March 9, 1950, and it is further

Stipulated by and between the proctors for the respective parties that the entire records of cases #2807 Civil, Evelyn C. Gardner, plaintiff vs. Panama Railroad Company, a corporation, defendant, and #2930, Civil, Evelyn C. Gardner vs. United States of America, be introduced and made a part of the record of this cause at this time, for the purpose of the present hearing only.

(Signed) Woodrow de Castro, Of Proctors for Libelant. (Signed) David J. Markun, Of Proctors for Respondent.

IN UNITED STATES DISTRICT COURT

OPINION—Filed April 3, 1950

This is an action in admiralty, filed in this Court October 19th, 1949, libelant alleging that on December 3rd, 1947, she was a passenger on respondent's vessel, S. S. Panama, and, that through the negligence of respondent, libelant sustained certain alleged personal injuries. Respondent entered a plea questioning the jurisdiction of the subject matter. This was overruled as per order entered February 13, 1950. (See Opinion of Court filed.)

[fol. 28] Respondent filed its answer on February 27, 1950, and under paragraph 14 thereof alleges as a separate and complete defense by way of bar the doctrine of laches; the substance of that paragraph being:—

"Further answering the libel and as a separate and complete defense thereto respondent alleges that the same is barred by the admiralty doctrine of laches, it appearing on the face of the libel that this suit was commenced more than one year after the date of the alleged injuries, and the applicable statute of limitations in tort causes of action in the Canal Zone being one year, as prescribed by subsection 3 of Section 87 of Title 4 of the Canal Zone Code."

As a pre-trial procedure, and for the purpose of determining, before trial of other issues, the effect of the plea of laches, proctors have entered into and filed an agreed stipulation to the effect that the issue of law and fact raised by virtue of the 14th paragraph of respondent's answer to the libel be tried separately and apart from the other issues of law and fact presented by the pleadings.

The sufficiency of such paragraph and plea, and whether the allegations contained therein constitute a bar to the maintenance of libelant's right of action, is now before the Court for determination. The rule is well established that there is no independent statute of limitations for suits in admiralty. However, the existence of facts and circumstances constituting laches, occurring between the accrual of a right of action and the institution of proceedings to enforce such right of action, may be considered and applied as a bar to the maintenance of such right of action. In determining the effect of any claimed laches, the Court will be guided by the statutes of limitation applicable to actions

similar to those asserted in such *da*miralty proceedings. [fol. 29] It will be noted that respondent pleads no specific acts as a basis for the claim of laches, but relies entirely on the allegation—

"... it appearing on the face of the libel that this suit was commenced more than one year after the date of the alleged injuries."

Under that specific and only allegation, libelant pleads the application of the Canal Zone Statutory Limitation of one year.

The allegations of the libel are that libelant was injured December 3, 1947, and this action in admiralty was filed October 19, 1949, one year, ten months, and seventeen days after the accrual of libelant's cause of action. The Fifth Circuit Court of Appeals, in the case of United States vs. Alex Dussell Iron Works, 31 Fed. (2) 535, had under consideration the sufficiency of allegations similar to those contained in the answer filed in case at bar. The sufficiency of the pleadings was tested by respondent filing exceptions to libelant's plea of laches. The Court, through Judge Grubb, said:—

"We think the defense of laches under the admiralty practice, as in equity, is as a rule properly presented by answer only and not by exception. This is certainly true, unless the libel on its face shows laches as a matter of law. Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time. The libel in this case charges that the cause of action arose March 7, 1920; that demand was made April 2, 1923; and that the libel was filed April 22, 1926. It also shows that respondent, [fol. 30] through its counsel, answered libelant's demand on April 14, 1923, by denying liability for the fire that caused the damage sought to be recovered by libelant. It also sets out libelant's efforts to locate eye witnesses to the starting of the fire, and its inability to find any until March 5, 1926, when it first discovered an eye witness, who would testify that the fire was caused by a heated rivet negligently dropped by an employee of respondent into the cargo of sugar on the ship of libelant. We do not think that the libel shows laches as a matter of law, unless it can be implied

from the delay of six years. Differing from prescription, time alone is not enough to show laches. The circumstances and the equities of the parties must be as well considered. The Key City, 14 Wall. 653, 20 L. Ed. 896. Laches is an affirmative defense, and, unless appearing upon the face of the pleadings, must be asserted by the answer of the respondent. If the exception be construed to present the defense of laches, we think it should have been presented by answer, and that the District Court erred in sustaining the exception of prescription or laches and in dismissing the libel. This results in a reversal of the decree of dismissal."

See also Loverick vs. Warner Co., 118 Fed. (2) 690-693.

The purport of the above decisions is that lapse of time alone, without asserting or pleading other facts or circumstances in connection therewith, is insufficient to constitute the plea of laches as a matter of law, and therefore insufficient to stand the tests of an exception or a demurrer. However, there is an exception to the above rule; that is, where the facts other than lapse of time appear on the face of the pleadings, or are within the judicial knowledge of the Court, such facts constituting laches need not be pleaded. [fol. 31] California Casualty Indemnity vs. United States, 74 Fed. Supp. 408.

The pleadings filed herein contain no facts other than lapse of time, and without other claimed facts do not constitute laches as a matter of law, and are insufficient to state a proper defense to libelant's cause of action. No facts other than lapse of time are available from the pleadings, and none shown from which the Court can take judicial knowledge. However, assuming, but not deciding, respondent may have the right to amend that part of its answer pleading facts constituting laches. Assuming further that an amended answer is filed, and such amendment contains sufficient facts to constitute in law a plea of bar by laches, respondent's position under the law as hereinafter referred to would be of no greater advantage to respondent than that afforded under law as found herein.

Libelant's injuries were sustained December 3, 1947, at which time her cause of action became vested. Under the law and for the purpose of enforcing her right of action she could proceed by an action in common law or by an action in admiralty. The period of time within which to proceed by common law was limited by sub-section 3 of

Section 87 of Title 4 of the Canal Zone Code to one year, whereas, under admiralty, an action could be instituted at any time before being barred by laches, but within the statutory period of one year (The Action in Admiralty Act not applying in the Canal Zone). The fact of libelant's alleged injury having occurred on December 3, 1947, and this action in admiralty having been filed October 19, 1949, aggregating a period of one year ten months and seventeen days, libelant's remedy of enforcing her right of action by admiralty proceedings subjected such remedy to the statutory limitations governing actions in common law, and [fol. 32] therefore, under sub-section 3 of Section 87 of Title 4 of the Canal Zone Code, Libelant's admiralty action is now barred by that statute and is not maintainable.

The above reasoning is supported by the case of McGrath vs. Panama Railroad Company, an opinion of the Fifth Circuit Court of Appeals, reported in 298 Federal Reporter, pages 303 and 304, wherein Judge Grubb said:

"The applicable statute of limitations for actions at common law for personal injuries in the Canal Zone is one year from the date of the injury. The limitation of three years, which obtains under the Code of Colombia, was superseded by the repealing clause of the legislation and executive orders, which put into effect the Canal Zone Code of Civil Procedure. Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in Courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred.

"(2, 3) The appellant suggests than no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of [fol. 33] limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the pre-

sumption of injury, until the contrary is shown. The appellant relies also upon erroneous advice given her by her counsel in Panama as to the applicable statute of limitation, namely, the statute of three years under the Code of Colombia, as being a circumstance that would make it inequitable for a Court of equity to follow the common-law limitation. In view of the fact that the limitation of one year was prescribed by the Canal Zone Code of Civil Procedure, we do not think that the mistake of counsel was sufficient to justify a Court of admiralty in departing from the analogy of the statutory limitation."

This Court has not lost sight of the fact that libelant in this case filed on April 10, 1948, her Action No. 2807 in common law. In that proceeding an order was entered directing the dismissal of that action. (See Action No. 2807.) On November 29, 1948, libelant instituted action in common law, under Action No. 2930. That action was likewise ordered dismissed by the Court for want of jurisdiction. (See Action No. 2930.) This present action in admiralty, No. 3097, was instituted on October 19, 1949.

Notwithstanding the dismissal of Actions 2807 and 2930, libelant in this case had the right until December 2, 1948, to proceed either in common law or by admiralty, but such right expired thereafter. In view of that failure, no facts or circumstances in her favor can prevent the running of the statutory limitation of one year.

See Marshall vs. International Mercantile Marine Company, 39 Fed. (2) 551.

[fol. 34] An order will be entered dismissing the libel in admiralty herein, with exceptions to libelant.

Apr. 3, 1950.

(Signed) Joseph J. Hancock, Judge.

cc/All parties. File.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed and Entered April 6, 1950

The defense of laches, raised by the fourteenth paragraph of respondent's answer, having been duly submitted to the Court by stipulation of the parties, and upon the

pleadings, briefs, and oral argument of proctors for libelant and respondent, and the Court being fully advised in the premises;

Now, Therefore, it is adjudged that the aforesaid defense be and hereby is sustained, and it is ordered, adjudged, and decreed that the libel herein be and hereby is dismissed and that plaintiff take nothing by this suit; to all of which libelant excepts.

(Signed) Joseph J. Hancock, Judge.

Dated April 6, 1950.

[fol. 35] In United States District Court

Notice of Appeal—Filed April 14, 1950

To The Honorable Clerk of the United States District Court for the District of the Canal Zone and to Paul A. Bentz, Paul M. Runnestrand and David J. Markun, Esqs. Proctors for Respondent:

Please take notice that the libelant, Evelyn C. Gardner, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment rendered by this, the United States District Court for the District of the Canal Zone, entered on the 6th day of April, 1950, in favor of the respondent and against the libelant, sustaining the defense of laches interposed by the said respondent to the libel and dismissing the said libel.

(Signed) Woodrow de Castro, of Proctors for Libelant.

In United States District Court

Stipulation—Filed May 15, 1950

Pursuant to Rule 49 of the Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court of the United States, and Rule 12 of the Rules of the United States Court of Appeals for the Fifth Circuit, and for the purpose of limiting the record, which is to be transmitted to the Court of Appeals for the Fifth Circuit in this appeal, to those times necessary to a disposition of

the issues presented on appeal and to clarify certain por-
[fol. 36] tions of the record which will be transmitted, it is hereby stipulated by and between the parties hereto, by their respective proctors, that:

I. The cases of Evelyn C. Gardner, plaintiff, vs. the Panama Railroad Company, a corporation, defendant, Civil No. 2807, and Evelyn C. Gardner, plaintiff, vs. the United States of America, defendant, Civil No. 2930, both of which were litigated in the above captioned Court, and the records of which have been incorporated in the above-entitled case by stipulation of the parties filed March 13, 1950 for the purpose of determining the issue of laches raised in the above styled case, were both brought by the libelant herein, and the alleged cause of action in each of them was founded upon the same injury which forms the basis for the alleged cause of action in the above entitled case.

II. Of the record in said actions, i.e., Civil No. 2807 and Civil No. 2930, only the respective judgments entered therein shall be included by the Clerk of the above-captioned Court in making up the record to be transmitted to the Court of Appeals for the Fifth Circuit.

(Signed) Woodrow de Castro, of Proctor for Libelant-Appellant. (Signed) Paul A. Bentz, of Proctor for Respondent-Appellee.

[fol. 37] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS

(Filed May 15, 1950)

The libelant-appellant, Evelyn C. Gardner, appeals from the judgment and order of the Court of April 6, 1950, sustaining the respondent-appellee's defense of laches and thereupon dismissing the libel.

Van Siclen, Ramirez & de Castro, (Signed) By Woodrow De Castro, Proctor for Appellant.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed May 15, 1950)

The appellant herein, Evelyn C. Gardner by Van Siclen, Ramirez & de Castro, her proctors designates the following portions of the record of the above captioned cause for inclusion in the record to be submitted to the United States Circuit Court of Appeals for the Fifth Circuit:

1. The judgment of the United States District Court for the District of the Canal Zone, Balboa Division, in the case of Evelyn C. Gardner, Plaintiff v. The Panama Railroad Company, a corporation, defendant, Civil No. 2807, entered therein on October 7th, 1948, the record of which case has heretofore been made a part of the record of the case at bar for certain purposes pertinent to this appeal.

[fol. 38] 2. The judgment of the United States District Court for the District of the Canal Zone, Balboa Division in the case of Evelyn C. Gardner, Plaintiff v. The United States of America, Defendant, Civil No. 2930, entered therein on October 14th, 1949, the record of which case has heretofore been made a part of the record of the case at bar for certain purposes pertinent to this appeal.

3. The Libel.

4. The Answer.

5. The Stipulation of the parties entered into on March 13, 1950.

6. The Minutes of March 9, 1950.

7. The Judgment dated April 6, 1950.

8. The Notice of Appeal.

9. Stipulation of parties dated May 15, 1950.

Van Siclen, Ramirez & de Castro, (Signed) By Woodrow de Castro, Proctors for Appellant.

[fol. 39] IN UNITED STATES DISTRICT COURT

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

(Filed May 18, 1950)

Whereas, on May 15, 1950, Libelant-Appellant in the above-entitled suit filed in the above-entitled Court a Desig-

nation of Contents of Record on Appeal, and a Statement of Points, presumably pursuant to Rule 75 of the Rules of the United States Court of Appeals for the Fifth Circuit:

And notwithstanding Respondent-Appellee's understanding and belief that the record on appeal in admiralty cases is necessarily for preparation under the express provisions of Rule 49 of the Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court of the United States, as adopted and incorporated by Rule 12 of the Rules of the United States Court of Appeals for the Fifth Circuit; that such record should include all items required to be included by said Rule 49, except to the extent that the parties to the appeal may agree by written stipulation that certain items may be omitted therefrom; that the parties should thereafter enter into a stipulation settling the record thus prepared; that the Clerk of the above-entitled Court would thereupon certify the record thus prepared and settled; and that therefore no designations should be required in this appeal;

Appellee Hereby Designates the following additional contents for inclusion in the record on appeal:

1. Respondent-Appellee's Plea to the Jurisdiction of the Subject Matter, filed November 23, 1949;

[fol. 40] 2. "Findings on Exceptions to Answer in Admiralty," being an opinion and order of the Court denying Respondent-Appellee's Plea to the Jurisdiction of the Subject Matter and overruling the motion to dismiss, filed February 13, 1950;

3. Order overruling Respondent-Appellee's Motion to Dismiss, filed February 15, 1950;

4. Opinion Directing Order of Court, filed April 3, 1950;

5. Libelant-Appellant's Designation of Contents of Record on Appeal, filed May 15, 1950;

6. Libelant-Appellant's Statement of Points, filed May 15, 1950;

7. Respondent-Appellee's Cross-Assignment of Errors, filed on the date of filing this designation; and

8. This designation.

(Signed) Paul A. Bentz, Of Proctor for Respondent-Appellee.

In United States District Court

Appellee's Cross-Assignment of Errors Cross-Statement of Points

(Filed May 18, 1950)

The Respondent-Appellee hereby serves notice that on the appeal of the above-entitled suit it will rely for an affirmance of the Court's judgment of April 6, 1950, dismiss-[fol. 41] in the libel, not only upon the ground stated in said judgment, to-wit, that the suit is barred by laches, but also on the ground that the Court is without jurisdiction over the subject matter of the suit for the reasons stated in Respondent's Plea to the Jurisdiction of the Subject Matter pleaded in this suit;

And Therefore, assigns as error the order of the District Court dated February 15, 1950, overruling Respondent's Motion to Dismiss for lack of jurisdiction over the subject matter, on the ground that the Court's order was erroneous as a matter of law.

(Signed) Paul A. Bentz, Of Proctor for Respondent-Appellee.

In United States District Court

Judgment

(Filed October 7, 1948)

No. 2807, Civil

The defense raised by the second paragraph of defendant's answer, namely, that the Court is without jurisdiction of the defendant and the subject matter because of the applicability of the Federal Tort Claims Act to this cause of action, having been duly submitted to the Court on September 10, 1948, upon plaintiff's motion, as subsequently amended, to strike said second paragraph, and upon the pleadings, briefs and arguments of counsel for plaintiff and defendant, and the Court being fully advised in the premises;

[fol. 42] Now, Therefore, it is adjudged that the aforesaid defense be and hereby is sustained and it is ordered,

adjudged, and decreed that the complaint herein be and hereby is dismissed and that plaintiff take nothing by this action; to all of which the plaintiff excepts.

Dated Oct. 7th, 1948.

(Signed) Joseph J. Hancock, Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT

(Entered October 14, 1949)

Civil No. 2930

This cause, having been filed on November 29, 1948, under the Federal Tort Claims Act, Public Law 773, 80th Congress, approved June 25, 1948, and effective September 1, 1948, seeking damages for personal injuries allegedly sustained by plaintiff while she was a passenger on the SS Panama, a vessel owned and operated by the Panama Railroad Company, came on regularly on October 7, 1949, upon defendant's motion, filed September 14, 1949, for dismissal of said cause for want of jurisdiction, and Charles E. Ramirez, Esquire, appearing as attorney for the plaintiff, and Rowland K. Hazard, Esquire, Assistant United States Attorney for the District of the Canal Zone, appearing as attorney for the defendant, and counsel for the plaintiff having stated to the Court that he neither opposes or consents to defendant's motion for dismissal, and counsel for the defendant having filed on September 22, 1949, in the Court a memorandum in support of said [fol. 43] motion to dismiss, said motion was submitted to the Court without oral argument and taken under advisement for decision, and it appearing before trial of said cause the Federal Tort Claims Act was amended on July 16, 1949, by adding subsection "m" to Section 2680 of Title 28, United States Code, which excludes jurisdiction of maintaining an action against the United States Government in reference to "any claim arising from the activities of the Panama Railroad Company," and the Court being fully advised in the premises and having by opinion dated October 13, 1949, sustained defendant's motion to dismiss with exception to plaintiff, now,

On motion of Rowland K. Hazard, Esquire, Assistant United States Attorney,

It is hereby ordered, adjudged and decreed:

1. That plaintiff's cause is dismissed for want of jurisdiction with exception to the plaintiff.

2. That plaintiff's cause is stricken from the docket.

(Signed) Joseph J. Hancock, Judge.

Dated this 14 day of October, 1949.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

SUBMISSION OF THE CASE UPON THE RECORD AND BRIEFS ON FILE, ON JOINT REQUEST OF COUNSEL

Extract from the Minutes of November 8, 1950

No. 13259

EVELYN C. GARDNER
versus
PANAMA RAILROAD COMPANY

The above entitled and numbered cause was taken under submission by the Court upon the record and briefs on file, without oral argument, on the joint request of counsel.

[fol. 46] OPINION OF THE COURT—Filed December 14, 1950

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13,259

EVELYN C. GARDNER, Appellant,
versus
PANAMA RAILROAD COMPANY, Appellee

Appeal from the United States District Court for the Canal Zone

(December 14, 1950)

Before Hutcheson, Chief Judge, and McCord and Borah, Circuit Judges.

HUTCHESON, Chief Judge:

Brought in admiralty[1] by a libel *in personam* filed October 19, 1949, the suit was for damages for injuries sus-
[fol. 47] tained by appellant (libellant below) on Dec. 3,

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[1] Two prior suits had been brought at law by libellant based on the same injuries. One of these, filed April, 1948, against the respondent, was dismissed on Oct. 7, 1948, for

1947, while a passenger on board the steamship "Panama", a vessel owned, maintained, and operated by appellee (respondent below).

Respondent, alleging that no cause of action in admiralty arose because at the time of the occurrence complained of, the Federal Torts Claim Act provided the exclusive judicial remedy, moved to dismiss the cause.

The court, on full consideration, overruled this motion, and the respondent answered, pleading, among other defenses, laches, in that the applicable statute of limitations in tort actions in Panama is one year, that it appears on the face of the libel that the suit was commenced more than one year after the date of the alleged injuries, and that, therefore, "it would be inconsistent to permit her to sue in admiralty with the same effect as at common law after her right to sue at common law had been barred".

This defense was by agreement separately heard and submitted.

The district judge, on the authority of *McGrath v. Panama Railroad Co.*, 298 Fed. 551, sustained the defense and dismissed the libel, and libellant is here claiming that it was error to do so.

Respondent, insisting that it was not, insists also that its motion to dismiss on the ground that the Federal Tort Claims Act provided the exclusive judicial remedy was well taken and the suit should have been dismissed on that ground.

In agreement as we are with the opinion of the district judge that laches has barred the action, we find it unneces- [fol. 48] sary to determine whether the suit should have been dismissed on the first ground urged by respondent

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want of jurisdiction of the subject matter of the suit because the Federal Tort Claims Act furnished an exclusive remedy against the United States. The second was filed Nov. 29, 1948, against the United States under the Tort Claims Act. Before that action proceeded to trial on the merits, Congress by specific amendment to Sec. 2680, Title 28 U.S.C., amended the Tort Claims Act by adding to the exclusions "(m) any claim arising from the activities of the Panama Railroad Company", and on motion the court dismissed the action for want of jurisdiction.

that libellant had no cause of action in admiralty because the Tort Claims Act furnished the exclusive remedy.

We find no error in the judgment of dismissal. It is affirmed.

[fol. 49] JUDGMENT

Extract from the Minutes of December 14, 1950

No. 13259

EVELYN C. GARDNER

versus

PANAMA RAILROAD COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Canal Zone, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered, adjudged, and decreed, by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Evelyn C. Gardner, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

EVELYN C. GARDNER, Petitioner,

vs.

PANAMA RAILROAD COMPANY

ORDER

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and it is hereby, extended to and including 29th of March, 1951.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 14th day of March, 1951.

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 638

ORDER ALLOWING CERTIORARI—Filed May 21, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 22

Office-Supreme Court, U. S.
FILED
MAR 27 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Evelyn C. Gardner,

Petitioner

versus

Panama Railroad Company, a Corporation

Woodrow de Castro
Counsel for Petitioner

SUPREME COURT
OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Evelyn C. Gardner,

Petitioner

versus

Panama Railroad Company, a Corporation

Woodrow de Castro
Counsel for Petitioner.

The petition of EVELYN C. GARDNER that a Writ of Certiorari issue out of this Honorable Court to the United States Court of Appeals, Fifth Circuit, in the case of EVELYN C. GARDNER, Appellant, vs. PANAMA RAILROAD COMPANY, Appellee, No. 13,259 in admiralty, alleges that:

Petitioner was injured on December 3, 1947, while a passenger on board the S. S. "Panama", a vessel owned, and operated under the American flag, by the Panama Railroad Company, a corporation, on the high seas en route from New York City to Cristobal, Canal Zone.

On April 9, 1948, petitioner filed, in the United States District Court for the District of the Canal Zone, an action at law number 2807, Civil, for damages against the Panama Railroad Company.

On October 7, 1948, case No. 2807 was dismissed, upon the motion of the defendant, because of the applicability of the Federal Tort Claims Act making the United States, and not the Panama Railroad Company, the proper party defendant.

On November 29th., 1948, petitioner filed an action at law, No. 2930 Civil, in the same Court, for damages arising from the same circumstances as in No. 2807, against the United States.

On October 13, 1949, upon the motion of the United States Attorney for the District of the Canal Zone, case No. 2930 was dismissed on the ground that the Court had been deprived of jurisdiction as a consequence of the enactment by Congress on July 16, 1949, of Public Law 172, 81st. Congress, amending the Federal Tort Claims Act, (Title 28, section 2680 U.S.C.), by adding thereto subparagraph "M", which constitutes an addition to the exemptions from the applicability of the Act, and provides as follows:

"Any claims arising from the activities of the Panama Railroad Company."

On October 19, 1949, petitioner filed, in the same Court, a libel *in personam* in admiralty No. 2097, for damages against the Panama Railroad Company, arising from the same circumstances as formed the basis of cases numbers 2807 and 2930.

The Panama Railroad Company pleaded among others, the defense of laches. A hearing on the issue of laches, only, was had, by agreement of court and counsel, at which hearing the records of cases numbers 2807 and 2930 were introduced into evidence, by stipulation of counsel, for the purpose of the trial of the said issue. On April 6, 1950, the Court sustained the defense of laches and dismissed case No. 2097.

On April 14, 1950, petitioner filed notice of appeal from the order dismissing No. 2097, to the United States Court of Appeals for the Fifth Circuit.

On December 14, 1950, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the judgment of the District Judge dismissing case No. 2097 on the ground of laches. The Mandate of the Court of Appeals was received by the District Court on January 17, 1951.

This petition is based on Rule 38, subparagraph 5 (b) of the Supreme Court of the United States in that the United States Court of Appeals for the Fifth Circuit in the case at bar, has affirmed the rule that where a litigant has a choice of suing at law or in admiralty for the same cause of action, should he choose to sue in admiralty after the analogous period of the running of the statute of limitations, the action will be barred by laches, regardless of diligence or any other factors in his favor.

The aforementioned rule is in conflict with the decision of the United States Court of Appeals for the Second Circuit as enunciated in the case of Lincoln v. Cunard, 221 F 622, in which case an action at law to recover for personal injuries inflicted by a steamship was brought, within the time prescrib-

ed by the statute of the state, against the owner in a federal court in New York. From various causes, not chargeable to the fault of the plaintiff, the cause was delayed for more than two years, when it was dismissed for want of jurisdiction without prejudice, it having been learned that both parties were subjects of Great Britain. A new action in admiralty was commenced at once. The Court held that the plea of laches would not defeat the suit.

Respectfully submitted,

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SUPREME COURT
OF THE
UNITED STATES

PETITIONER'S BRIEF

Evelyn C. Gardner,

Petitioner

versus

Panama Railroad Company, a Corporation

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PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. GROUNDS FOR INVOCATION OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

The jurisdiction of the Honorable Supreme Court is invoked for a reason in accord with that set forth in Rule 38, paragraph 5, subparagraph b, of the Supreme Court.

The United States Court of Appeals for the Fifth Circuit, in the case at bar, has, in effect, held that where there is a choice of remedy for the same cause of action between an action at law and a suit in admiralty, an assertion of that choice in the form of the institution of a suit in admiralty after the expiration of a time analogous to the running of the local statute of limitations will defeat the projected action because of laches, regardless of diligence on the part of the moving party. The rule aforedescribed is in conflict with that set forth in the case of Lincoln v. Cunard Steamship Company, 221 F 622, in which it was held that lapse of time alone does not constitute laches, regardless of an analogous statute of limitations, or, by implication, of the initial existence of a choice to sue at law or in admiralty.

2. STATEMENT OF THE CASE:

Evelyn C. Gardner, the petitioner herein, was injured on December 3, 1947, while a passenger on board the S.S. *"Panama"*, a vessel owned and operated under the American flag by the Panama Railroad Company, a corporation, on the high seas en route from New York City to Cristobal, Canal Zone.

On April 9, 1948 petitioner filed in the United States District Court for the District of the Canal Zone, an action at law, number 2807, Civil, for damages against the Panama Railroad Company, (p 26 of the record).

On October 7, 1948, case number 2807 was dismissed, upon the motion of the defendant, because of the applicability of the Federal Tort Claims Act, (28 U.S. Code Sections 1291,

1346, 1402, 1504, 2110, 2401, 2402, 2412, 2671, 2680), making the United States, and not the Panama Railroad Company, the proper party defendant.

On November 29th, 1948, petitioner filed an action at law, number 2930, civil, (p 26 of the record) in the same Court, for damages arising from the same circumstances as in number 2807, against the United States.

On October 13th, 1949, upon the motion of the United States Attorney for the District of the Canal Zone, case number 2930 was dismissed on the ground that the Court had been deprived of jurisdiction as a consequence of the enactment by Congress on July 16, 1949, of Public Law 172, 81st Congress, amending the Federal Tort Claims Act, by adding thereto subparagraph "M", which constitutues an addition to the exemptions from the applicability of the Act, and provides as follows:

"Any claims arising from the activities of the Panama Railroad Company." (Page 19 of the record).

On October 19th., 1949, petitioner filed, in the same Court, a libel *in personam* in admiralty, number 2097, for damages against the Panama Railroad Company (Page 1 of the record) arising from the same circumstances as formed the basis of cases numbers 2807 and 2930.

The Panama Railroad Company pleaded among others, the defense of laches (page 24 of the record). A hearing on the issue of laches, only, was had, by agreement of Court and counsel, (page 26 of the record), at which hearing the records of cases numbers 2807 and 2930 were introduced into evidence by stipulation of counsel, (page 26 of the record), for the purpose of the trial of the said issue. On April 6th, 1950, the District Court sustained the defense of laches and dismissed case number 2097, (p 34 of the record).

On April 14th, 1950, petitioner filed notice of appeal from the order dismissing case number 2097, (p 35 of the record), to the United States Court of Appeals for the Fifth Circuit.

On December 14th, 1950, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the judgment of the District Court dismissing case number 2097 on the ground of laches. The Mandate of the Court of Appeals was received by the District Court on January 17th, 1951. A certified copy of the said opinion and Mandate of the Court of Appeals are included as a part of the record hereof.

3. ASSIGNMENT OF ERRORS: The United States Court of Appeals for the Fifth Circuit erred in sustaining the judgment of the United States District Court for the District of the Canal Zone dismissing the libel as a matter of law on the ground of laches.

4. ARGUMENT:

Laches as a matter of law is composed of two elements, the lapse of time, and diligence, or the lack of it, on the part of the moving party: Holmberg v. Armbrecht, 327 U.S. 392, 66 S. Ct. 582.

This Honorable Court held, in the case of John M. Young vs. The Steamboat *"Key City"*, 81 U.S. 896, decided in 1872, that Courts of Admiralty are not bound, in determining whether or not a litigant has been guilty of laches in the institution of an action, by the local statute of limitations, but the delay which will defeat such a suit must in every case depend upon the peculiar equitable circumstances of that case.

In the case at bar the moving party brought not one, but two, actions against, in each case, respectively, the proper party defendant on the same cause of action. Petitioner could in no way have acted more diligently.

During the pendency of the second action instituted by petitioner, Congress, on July 16th., 1949, enacted Public Law 172, 81st Congress, which in effect legislated Petitioner out of Court. Within six days of the order dismissing case number 2930, civil, Petitioner filed the suit at bar in admiralty

seeking redress for the same wrong as that alleged in case number 2930. Petitioner was as diligent as was possible under the circumstances.

The legislative history of Public Law 172, as contained in pages 1753 - 1758 of the United States Code Congressional Service, number 6, for 1949 — 18st Congress, 1st Session, June 24 to August 10th., Chapter 240-416, shows that the intention of Congress in enacting the said Law was certainly not to restrict, but rather to improve the position of prospective litigants. It is grossly inequitable that the purely fortuitous injustice of the effect of the passage of Law 172 should be given will and purpose by the courts.

Within the time prescribed by the statute of the state, an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a federal court in New York. From various causes not chargeable to the fault of the plaintiff, the cause was delayed for more than two years, when it was dismissed for want of jurisdiction without prejudice, it having been learned that both parties were subjects of Great Britain. A new action in admiralty was commenced at once, and the United States Circuit Court of Appeals, Second Circuit held, in the case of Lincoln v. Cunard S.S. Co., 221 F 622, that libelant could not be charged with laches to defeat the suit.

In the very case relied upon as the controlling precedent in the case at bar by both the trial Court and the Court of Appeals, the case of McGrath v. Panama Railroad Company, 298 F 303, the Court of Appeals for the Fifth Circuit did not go so far as to hold that where there was a choice to sue at law or in admiralty on the same cause of action, and the choice was asserted by the instituting of a suit in admiralty after the lapse of a time analogous to the local statute of limitations, the suit would be barred by laches. The facts in the McGrath case differed from those in the case at bar in that, most significantly, the moving party had shown no diligence prior to filing the suit in admiralty.

The legislative history of Public Law 172, show also an intention contrary to the assertion made by the Panama Railroad Company in one of the defenses pleaded by it to the libel in the case at bar, namely; that no cause of action ever arose against the Panama Railroad Company since on December 3, 1947, the Federal Tort Claims Act was applicable to the activities of the Company, and a cause of action due to its activities could arise only against the United States. Such a contention on the part of the Panama Railroad Company would, if sustained, deprive seamen, and others, who were injured as a result of the activities of the Panama Railroad Company after the enactment of the Federal Tort Claims Act, or before the enactment of the amendment thereto contained in Public Law 172, of a remedy.

Respectfully submitted,

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Office-Supreme Court, U. S.
FILED
SEP 17 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 22.

EVELYN C. GARDNER,

Petitioner,

v.

PANAMA RAILROAD COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 22.

EVELYN C. GARDNER,

Petitioner,

v.

PANAMA RAILROAD COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN APPEAL No. 13259 IN ADMIRALTY.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the Court of Appeals for the Fifth Circuit (R. 31-32) is reported in 185 F. 2d 730. The opinion of the United States District Court for the District of the Canal Zone, dismissing the libel on the ground of laches appears at R. 19-23.

Jurisdiction.

A writ of certiorari was granted on May 21, 1951 (R. 35), pursuant to 28 U. S. Code 1254 (1).

Question Presented.

Whether the Courts below erred in dismissing the libel on the ground of laches.

Statement.

Without a trial on the merits, petitioner has had her libel dismissed on the ground that laches in admiralty was inflexibly controlled by the limitation applicable to actions at law, and that "no facts or circumstances in her favor can prevent the running of the statutory limitation of one year" (R. 23).

The facts bearing on laches are not in dispute, being a matter of court record specifically stipulated by the parties (R. 18).

First Action Against Respondent Dismissed on the Ground That Federal Tort Claims Act Provided Exclusive Remedy.

Petitioner was seriously injured on the high seas on December 3, 1947, while a passenger on board a vessel owned and operated by respondent, the Panama Railroad Company (hereinafter sometimes referred to as "the Company"), then a New York corporation. The Company, originally incorporated in 1849, has been owned by the Government of the United States since 1905, and was reincorporated by Federal statute in 1948.*

* As was true under its New York charter, by the statutory reincorporation of 1948, Panama Railroad Company was empowered to "sue and be sued in its corporate name" (Public Law 808, 80th Congress, June 29, 1948, Ch. 706, 62 Stat. 1075, amending §248 [d] of Tit. 2 of the Canal Zone Code). See U. S. Code Congressional Service, 80th Congress, Second Session, 1948, Legislative History, vol. 2, pp. 2157, 2159.

Meanwhile on April 10, 1948 petitioner instituted a civil action for damages at law (No. 2807) against the Company in the United States District Court for the Canal Zone (R. 10). The Company pleaded that it was an agency of the United States, that by the terms of the Federal Tort Claims Act of August 2, 1946, the exclusive remedy for torts by a federal agency (except those exempted) was by suit against the United States under that Act (60 Stat. 842; 28 U. S. C. 2671 and 2679 (formerly Sections 941 and 2680), and that accordingly a suit could no longer be maintained for its torts directly against the Panama Railroad Company (R. 10). A motion to strike this defense was denied, and the complaint was dismissed on the Company's motion on October 7, 1948 (R. 4, 10).

Timely Action Against the United States Instituted Under the Federal Tort Claims Act.

On November 29, 1948—still within the one-year period of limitations—petitioner instituted a civil action No. 2930 against the United States in the same District Court for the same damages, on the basis of the Federal Tort Claims Act. An answer joining issue on the merits was filed on behalf of the United States (R. 10, 11).

Amendment of the Federal Tort Claims Act in Relation to Claims Involving the Panama Railroad Company.

While action No. 2930 was pending—and more than one year after the injury complained of—Congress enacted Public Law 172 on July 16, 1949 (63 Stat. 440, 28 U. S. C. 2680 (m), which amended the Tort Claims Act by simply adding a subparagraph exempting from the purview of the Act:

> "(m) Any claims arising from the activities of the Panama Railroad Company."

The Congressional Committee reports establish that this amendment was designed to remove the bar of the Federal Tort Claims Act to direct actions against the Panama Railroad Company, and once again make it "subject to suit on all claims, tort as well as contract, in the same manner as any private corporation." (U. S. Code Congressional Service, 81st Congress, First Session, 1949, vol. 2, p. 1589). Included in the Committee reports, are letters from the president of the Panama Railroad Company (the Governor of the Canal Zone), the Secretary of War, and the Department of Justice, urging the amendment on the ground that since the Panama Railroad Company was engaged in various commercial activities and operated out of income and not from appropriated funds, it was unfair to seamen, longshoremen and others dealing with the Company, as well as an inconvenience to the Company, to subject its tort litigation to restrictions appropriate only in situations involving governmental immunity:

> "The varied activities of the Company, which include the operation of a railroad across the Isthmus of Panama with terminals in the Republic of Panama, the operation of a steamship line between the Isthmus and American ports, the operation of hotels and commissary stores, and the operation of related commercial enterprises, are not those to which the principle of governmental immunity to suit should be applied. * * * Before the enactment of the Federal Tort Claims Act, the Company was subject to suit on all claims, tort as well as contract, in the same manner as any private corporation. As a ship operator, it was subject to suit in the same manner as any shipping company * * *" (U. S. Code Congressional Service, 81st Congress, First Session, 1949, vol. 2, p. 1590).

Significant also is the following statement from the President of the Company contained in the letter of the

Secretary of the Army, and repeated again in the letter from the Department of Justice (p. 1594):

> "Since it is engaged in business as a common carrier and in other commercial enterprises, the basic policies underlying governmental immunity from suit do not apply to the Company, and it is desirable if not essential to *continue* unimpaired the ability of the Company to effect prompt settlement of meritorious claims and the amenability of the Company to suit in ordinary course" (U. S. Congressional Service, 81st Congress, First Session, 1949, vol. 2, p. 1593). (Italics ours.)

Dismissal of Petitioner's Federal Tort Claims Action.

Upon the adoption of Public Law 172, the United States moved to dismiss the then pending action on the ground that the amendment withdrew the remedy against the United States under the Federal Tort Claims Act for torts committed by the Panama Railroad Company. The Court granted the motion, and entered judgment dismissing that action on October 14, 1946, holding that it no longer had jurisdiction to entertain suits against the United States for such torts (R. 11).

Present Libel in Admiralty and Its Dismissal on the Theory of Laches.

On October 19, 1949, five days after the dismissal of the Federal Tort Claims action, petitioner filed the present libel in admiralty against the Panama Railroad Company (R. 11).

The Company filed a plea to the jurisdiction (R. 4-9), asserting that Public Law 172 had not only withdrawn the remedy against the United States, but had left peti-

tioner without any right against anyone. The District Court overruled this contention, holding that the amendment to the Federal Tort Claims Act restored petitioner to the same rights to sue the Company that she would have had if the Federal Tort Claims Act had never applied to claims arising from the Company's activities (R. 10-14).

The Company then answered averring laches, on the sole ground that more than one year had elapsed since injury occurred and that the Canal Zone statute of limitations for civil actions at law was one year (R. 17).

This defense came on for separate hearing. No evidence was produced by the Company suggesting prejudice; it relied on the bare fact that more than one year had elapsed between the date of the injury and the institution of the libel in admiralty (R. 21). By stipulation the entire record of the previous actions was made part of the case (R. 18). The District Court held that laches was controlled by the statute of limitations, regardless of the circumstances, writing (R. 23):

> "Notwithstanding the dismissal of Actions 2807 and 2930, libelant in this case had the right until December 2, 1948, to proceed either in common law or by admiralty, but such right expired thereafter. In view of that failure, no facts or circumstances in her favor can prevent the running of the statutory limitation of one year."

It is difficult to understand the Court's statement that libelant "had the right until December 2, 1948, to proceed either in common law or by admiralty" in view of that Court's previous holdings—in connection with the dismissal of Action 2807 and in its finding in this action—that no suit could be maintained against the Company while the Federal Tort Claims Act was applicable (R. 10-11). As the Federal Tort Claims Act applied during the entire

one-year period until its amendment in 1949, and as the Court expressly found that during this period "the remedy for enforcement of libelant's cause of action was confined exclusively against the United States" (R. 11)—there is no basis for any suggestion of laches.

Apparently the District Court, for purposes of the statute of limitations, considered the situation as if the Federal Tort Claims Act had never existed, and then treated the statute so construed as equivalent to laches in admiralty.

The judgment below was affirmed by the Court of Appeals on the ground of laches, in an opinion which does not discuss the problem (R. 31-33).

POINT I.

The Courts below erred in dismissing the libel on the ground of laches.

The diligence of the petitioner, her persistent efforts to vindicate her rights by action, and the absence of prejudice to the respondent are apparent from the record.

The Courts below held as a matter of law that laches in admiralty must be conclusively determined against the claimant by the passage of one year, regardless of the "facts or circumstances in her favor" (R. 23).

This was clearly error. It is well settled that in admiralty the statute of limitations is not controlling, and that the only time bar is that based on the principle of laches, which depends upon the equitable circumstances of the particular case, and not on mere lapse of time.

In *Young v. The Steamboat "Key City"*, 81 U. S. (14 Wall.) 653, this Court, reversing a dismissal below on the

ground of laches, pointed out that it was settled doctrine in admiralty:

> "That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that delay which will defeat such suit must in every case depend on the peculiar equitable circumstances of that case."

This principle has been repeatedly enunciated in subsequent admiralty cases:

> "Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time" (*United States* v. *Alex Dussel Iron Works, Inc.*, 31 F. 2d 535 at 536 [C. C. A. 5, 1929]).

Accord:

> *Loverich* v. *Warner Co.*, 118 F. 2d 690, 693 (C. C. A. 3, 1941), cert. den. 313 U. S. 577.

See also:

> *Lincoln* v. *Cunard Steamship Co.*, 221 Fed. 622 (C. C. A. 2, 1915);
> *McGrath* v. *Panama Railroad Co.*, 298 Fed. 303 at 304 (C. C. A. 5, 1924).

Laches means lack of diligence or acquiescence—something completely negatived in the instant case.

> "But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy" (Brandeis, J., in *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 at 488-489).

While the failure of a plaintiff to bring *any* suit until after the expiration of the common law period of limita-

tions may be deemed indicative of laches *in the absence of adequate explanation*, reference to the statute "is only an analogy and not a rule" (*Loverich* v. *Warner Co.*, 118 F. 2d at 693).

What the Courts below did was to apply the statute of limitations by mechanical rule, disregarding the undisputed record facts conclusively disproving actual laches.

As recently stated by this Court in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, overruling a finding of laches (Frankfurter, *J.*):

> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.' *Galliher* v. *Cadwell*, 145 U. S. 368, 373; see *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488-89."

As further stated in the same case (p. 396):

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See *Russell* v. *Todd*, *supra* (309 U. S.) at 289."

In the instant case, far from sleeping on her rights, petitioner vigorously attempted to prosecute them by timely litigation. She was frustrated, in the only remedy then available, by a statutory amendment, adopted by Congress at the request of this Company, with the pur-

pose of restoring the remedies against Panama Railroad Company.

Even where a plaintiff has long neglected to adopt an available remedy—and here there was no such neglect—such delay will not constitute laches where the plaintiff has evidenced diligence by litigation brought in the interim.

In *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, the claim of laches was raised in a suit brought 22 years after the wrong. In the interim, plaintiff and his associates had maintained several other inappropriate suits, resulting in dismissals. As the proper remedy had been available at all times, defendant urged laches. Overruling the contention, this Court pointed out that the plaintiff's conduct showed diligence, and that, absent prejudice to the defendant, the passage of time was not a bar:

> "Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence."

Similarly in *Lincoln* v. *Cunard Steamship Co.*, 221 Fed. 622 (C. C. A. 2d 1915), almost two years after the accident, libellant began an action at law in the District Court, on the assumption that he was an American citizen. Upon dismissal for lack of diversity—4 years after the injury—he brought an admiralty suit. The Circuit Court of Appeals refused to dismiss on the ground of laches, pointing out that the analogy of the statute of limitations is not followed in admiralty where the circumstances "may be regarded as exceptional."

If, as was true in these cases, a long delay resulting from a mistake by plaintiff or his counsel will not constitute laches, where diligence is shown by the prosecution of erroneous litigation, there can be no basis for asserting laches where, as here, petitioner, constantly

endeavoring by litigation to vindicate her claims, had pending a timely action which, without her fault, was terminated by the most "exceptional" circumstance of a statutory amendment.

The case of *McGrath* v. *Panama Railroad Co.*, 298 Fed. 303 (C. C. A. 5, 1924), relied upon below, actually supports our position. There the libelant, apparently without any prior suit, had instituted his libel after the running of the limitation at law. The only explanation for the delay was the assertion that counsel had thought a longer statute of limitations applicable. The Court rejected this excuse, doubtless feeling that similar subjective excuses for non-action might be advanced in almost any case. However, Judge Grubb in his opinion expressly recognized:

> "Courts of admiralty are not, however, bound by common law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so" (p. 304).

Here the Courts below treated themselves as disabled from considering equitable circumstances (R. 23).

The present case differs in a number of vital respects from the *McGrath* cases: (1) Petitioner established her diligence by instituting two actions prior to the expiration of the one-year period; (2) Petitioner could not have maintained a libel in admiralty against the Company within the one-year period in view of the then applicable provisions of the Federal Tort Claims Act; (3) Petitioner's timely action under the Federal Tort Claims Act—the only remedy then available—was frustrated by the exceptional circumstance of a statutory amendment, designed by Congress to restore the situation existing prior to the Federal Tort Claims Act; (4) As soon as petitioner's Federal Tort Claims action was dismissed, she immediately instituted the present libel; (5) It is doubtful whether even at law the statute of limitations ran in

favor of the Company during this period as "the right to sue was suspended by the Act of the Government"* (*Hanger* v. *Abbott*, 6 Wall. 532 at 541).

But whatever the statute of limitations may be at law, it is plain that here no laches—acquiescence or lack of diligence—existed. On any theory of laches the exceptional circumstances and the inequity of depriving the libelant of a trial on the merits are clear.

The judgment below not only produced an injustice, but was reached by a disregard of established and basic principles of equity and admiralty law.

POINT II.

There was jurisdiction over the subject matter.

The Company, in opposing the writ of certiorari, indicated that it would urge that dismissal should have been granted on the ground of "lack of jurisdiction over the subject matter". This contention was expressly overruled in an opinion by the District Court (R. 10-14), and the Court of Appeals deemed it unnecessary to pass upon the point (R. 32-33).

The Company's position is that when Congress passed Public Law 172 amending the Federal Tort Claims Act so as to withdraw from its purview torts committed by the Panama Railroad Company, the result was to leave persons injured by that corporation (including seamen, longshoremen and passengers) without any remedy at all.

---

* This common law exception to the running of the statute is embodied in the Canal Zone Code, Tit. 4, §107: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

This would subvert the sole and expressed purpose of Public Law 172 to restore the former situation by which "the Company was subject to suit on all claims, tort as well as contract, in the same manner as any private corporation". Committee Report (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Legislative History, Vol. 2, p. 1590).

Prior to the Federal Tort Claims Act the Company, like any other corporation, was concededly subject to suit for its torts (*Panama Railroad Company* v. *Minnix*, 282 Fed. 47), and the reincorporation of 1948 expressly prescribed that it could be sued in its corporate name (Public Law 808, 80th Congress, June 29, 1948, Ch. 706, 62 Stat. 1075, amending Canal Zone Code, Tit. 2, §248 [d]).

The Federal Tort Claims Act, in providing a remedy against the United States for torts of its agents and agencies, by definition included government owned corporations (28 U. S. Code 2671, formerly 941). So long as the statute applied to the Panama Railroad Company, the right to pursue ordinary remedies by direct suit against the Company was suspended, because of the provision that the remedy against the United States was exclusive on those "claims which are cognizable under section 1346 (b) of this title" (28 U. S. Code 2679).

When Congress, by the adoption of Public Law 172, made claims involving the Panama Railroad Company no longer "cognizable" under Section 1346 (b) of Title 28, it removed the only bar to suit against that Company for its own torts. This did not create a new cause of action but simply restored the old remedy, in place of the remedy given by the Federal Tort Claims Act. (See *Wiltse v. United States*, 74 F. Supp. 786 at 787.) The intention of Congress to continue the Company subject to suit is plain. (See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389-390.)

The president of the Company in his letter urging the adoption of Public Law 172, after elaborately pointing out the unfairness to litigants of restricting them to the remedies of the Federal Tort Claims Act, concluded that the adoption of the amendment was essential "to continue unimpaired * * * the amenability of the Company to suit in the ordinary course" (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Vol. 2, p. 1592).

Yet now counsel for the Company contend that this amendment, far from continuing the amenability of the Company to suit, not only deprived litigants of their remedy against the United States but also of their right against the Company.

The District Court properly overruled this contention.

CONCLUSION.

The judgment of the Courts below should be reversed, with costs, and the case remanded for trial on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 22.

EVELYN C. GARDNER,

Petitioner,

v.

PANAMA RAILROAD COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN APPEAL NO. 13259 IN ADMIRALTY.

PETITIONER'S REPLY BRIEF.

---

1. Laches.

Respondent's cases state that admiralty draws upon the analogy of the statute of limitations only in the absence of exceptional circumstances explaining or excusing the delay. The undisputed facts establish the exceptional circumstance of a supervening statutory amendment and this petitioner's diligence—she did everything she could have done to vindicate her rights by action. Nor is there any basis for the argument that the District Court exercised a justifiable "discretion".

(a) There was no factual basis for a conclusion that laches—lack of diligence—here existed.

(b) The District Court's opinion negatives "discretion", for it erroneously held that, regardless of circumstances, the mere passage of one year created a bar, stating unequivocally "no facts or circumstances in her favor can prevent the running of the statutory limitation of one year" (R. 23).

2. "Jurisdiction."

Abstract discussion as to whether the Tort Claims Act created a new cause of action against the United States or merely gave a remedy is irrelevant.* Here no question of a new cause of action can arise, as there has *always* been an actionable cause of action for torts committed by the Panama Railroad Company, a corporation.

The only effect here of the Tort Claims Act (until its amendment by Public Law 172) was to substitute for the remedy of direct action against the Company, a remedy against the United States, made exclusive as to "claims which are cognizable" against the United States (28 U. S. Code 2679). The 1949 amendment simply removed this bar to the enforcement of the pre-existing remedy, by making such claims no longer "cognizable" against the United States.

Respondent concedes that Congress had no intention to destroy all rights of persons injured in the meanwhile "in view of the legislative purpose of Public Law 172" (Respondent's brief, p. 19), but insists that

* This Court has recently held that it merely was intended to provide a remedy. *Feres* v. *United States*, 340 U. S. 135, 140, 141 (1950). See also *Wilise* v. *United States*, 74 F. Supp. 786, 787; *Kendrick* v. *United States*, 82 F. Supp. 430, 432.

this unfortunate result is compelled in order to avoid "retroactivity". Actually no problem of retroactivity is involved; there is only a question of effectuating the Congressional intent that its instrumentality shall continue subject to suit.

As stated by Minton, *J.*, in *Standard Accident Insurance Co.* v. *Miller*, 170 F. 2d 495, 498 (C. C. A. 7, 1948):

> "the rule peculiarly applicable to remedial statutes, however, is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied, although the statute does not, in terms, so direct, unless to do so would impair some vested right, or violate some constitutional guaranty."

In *Connett* v. *City of Jerseyville*, 96 F. 2d 392, 400 (C. C. A. 7, 1938), defendant contended that a statutory amendment, which withdrew previous remedies, should not be given retrospective effect as to the new remedies provided. The Court overruled this contention, and, after pointing out that "a curative or remedial enactment which merely affects the remedy or procedure will be given a retroactive effect", continued (Sparks, *J.*):

> "It would be unfair to the legislature to assume that it intended to strike down the remedy provided in the original Act, with no saving clause, without extending the relief afforded by the amendment to the existing certificate holders. There is no apparent reason why this should be done. To do so would be utterly inconsistent

with the expressed intention of the legislature * * *."

So here, respondent's contention not only disregards the established Congressional policy of liability for torts of government corporations even when there is no statutory provision (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381), but would completely subvert the expressed purpose of Public Law 172 to "continue unimpaired * * * the amenability of the Company to suit in the ordinary course" (U. S. Code Congressional Service, 81st Congress, 1st Session 1949, vol. 2, pp. 1589-1593).

CONCLUSION.

The judgment of the Courts below should be reversed with costs, and the case remanded for trial on the merits.

Respectfully submitted,

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CLERK

RESPONDENT'S BRIEF

In Opposition to Petition for Review on Writ of Certiorari

SUPREME COURT
OF THE
UNITED STATES

EVELYN C. GARDNER,

Petitioner,

versus

PANAMA RAILROAD COMPANY,

Respondent.

On petition for review on writ of certiorari of the decision of the Court of Appeals for the Fifth Circuit in appeal No. 13,259, in Admiralty, 185 Fed: 2d 730 (C. A. 5th C. 1950).

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SUPREME COURT
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EVELYN C. GARDNER,

Petitioner,

versus

PANAMA RAILROAD COMPANY,

Respondent.

On petition for review on writ of certiorari of the decision of the Court of Appeals for the Fifth Circuit in appeal No. 13,259, in Admiralty, 185 Fed. 2d 730 (C. A. 5th C. 1950).

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI

Official Report of Opinion of Which Review is Sought

The opinion of the Court of Appeals for the Fifth Circuit in the appeal of *Evelyn C. Gardner*, Appellant vs. *Panama Railroad Company*, Appellee, No. 13,259, in admiralty, review of which Petitioner-Appellant has requested by petition for review on writ of certiorari, is reported in *Gardner* vs. *Panama R. Co.*, 185 Fed. 2d 730 (C. A. 5th C. 1950) [R. p. 45].

Ground on Which Petitioner Seeks to Obtain Review on Writ of Certiorari

As a preliminary observation, it is noted that Petitioner makes no reference to any "statutory provision believed to sustain the jurisdiction" of this Court, as would appear to be required by paragraph 2 of Rule 38 and paragraph 1 of Rule 12 of the Supreme Court Rules.

The sole ground urged by Petitioner as a sufficient reason for the granting of its petition for writ of certiorari is its allegation that the decision of the Court of Appeals for the Fifth Circuit in the case at bar is in conflict with the rule of law set forth in *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 622 (C. C. A. 2d 1915) [Petition, p. 4]. Petitioner does not contend that the decision in the case at bar is in conflict with applicable decisions of the Supreme Court.

Statement of the Case (Amplified)

By way of amplifying Petitioner's statement of the case, it is desired to place before the Court the fact that on the appeal to the Court of Appeals for the Fifth Circuit, Respondent (Appellee there) relied for an affirmance of the judgment of the United States District Court for the District of the Canal Zone [R. p. 34], dismissing the libel, not only upon the grounds stated in said judgment, to wit, that the suit is barred by laches, but also on the ground that the District Court lacks jurisdiction over the subject matter of the suit. [R. pp. 6, 40]. Respondent in its cross-assignment of errors on appeal to the Court of Appeals specifically assigned as error the order of the District Court dated February

15, 1950 [R. p. 20], overruling Respondent's motion to dismiss for lack of jurisdiction over the subject matter, on the ground that the Court's order was erroneous as a matter of law [R. pp. 40, 41]. The Court of Appeals, being in agreement with the opinion of the District Judge that laches barred the suit, found it unnecessary to determine whether the suit should have been dismissed for lack of jurisdiction over the subject matter. *Gardner vs. Panama R. Co.*, 185 Fed. 2d 730 (C. A. 5th C. 1950) [R. p. 45]. Accordingly, if the petition for writ of certiorari were to be granted, Respondent would urge such additional ground, i.e. lack of jurisdiction over the subject matter, as an alternative reason for sustaining the decision of the Court of Appeals affirming the judgment of the District Court dismissing the libel.

Argument

Summary: The substance of Respondent's argument in opposition to the granting of the petition for review on writ of certiorari is that Petitioner's allegation that the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 662 (C. C. A. 2d 1915), which, as aforesaid, is the sole ground urged by Petitioner as warranting this Court in granting the writ, is clearly erroneous. It is respectfully submitted that Petitioner's erroneous conclusion stems from: (a) a misinterpretation of what was held by the Court of Appeals and by the District Court in the case at bar; (b) a misinterpretation of the *Lincoln* case and a failure to fit that case and the case at bar within the applicable general rule respecting the issue in dispute; and (c) an inexcusable failure to

consider and treat the more recent decisions of the Court of Appeals for the Second Circuit, which are considerably more directly pertinent and germane to the point at issue than is *Lincoln*, several of which decisions were cited and relied upon by Respondent, both in the District Court and on appeal to the Court of Appeals. Such decisions, far from indicating a conflict with the decisions of the Second Circuit, clearly indicate that such decisions on the point at issue are entirely consistent with and in harmony with the decision of the Court of Appeals in the case at bar.

The sole ground urged by Petitioner as a sufficient reason for the granting of its petition for review on writ of certiorari is its assertion that the decision of the Court of Appeals in the case at bar is in conflict with the rule of law set forth in *Lincoln vs. Cunard S. S. Co.*, 221 Fed, 622 (C. C. A. 2d 1915), which, by implication, is presumably urged as representing the law of the Second Circuit on the point at issue.

a. What the Court of Appeals and the District Court Held

To fairly and accurately analyze Petitioner's contention that the rule of law announced in the decision of the Court of Appeals is in conflict with the pertinent decisions of the Court of Appeals for the Second Circuit, it is necessary of course to examine preliminarily into what the Court of Appeals actually held in the case at bar. Petitioner asserts that the Court of Appeals " * * * has affirmed the rule that where a litigant has a choice of suing at law or in admiralty for the same cause of action, should he choose to

sue in admiralty after the analogous period of the running of the statute of limitations, the action will be barred by laches, regardless of diligence or any other factors in his favor." [Petition, p. 4.] Petitioner's brief reflects the same view of what the holding of the Court of Appeals was. [Petitioner's brief, p. 10.] Petitioner refers to no language of either the Court of Appeals or of the District Court which would tend to confirm its stated view of what the holding of the Court of Appeals was. This first portion of Respondent's argument will attempt to show in what respects Petitioner's view of the holding is incorrect and to state what the Court of Appeals actually held.

It is submitted that Petitioner's stated view of the holding of the Court of Appeals in the case at bar, to the extent that it suggests by implication that the Court held that the District Court was *bound* to dismiss the suit brought in admiralty because the libel was filed after expiration of the one-year period during which an action at law could have been brought for the same injuries, without regard to whether Petitioner (Libelant in the District Court) could show exceptional circumstances excusing its delay and rebutting the presumption of injury to Respondent resulting from such delay, is demonstrably erroneous.

The issue respecting laches which was before the Court of Appeals was the simple question of whether the District Court had abused its discretion in dismissing the libel on the ground of laches. This follows from two well-established principles of law:

First, the well-established doctrine, conceded by Libelant below, that the question of laches is addressed to the sound discretion of the trial court and that such court's decision on that issue will not be disturbed on

appeal unless so clearly wrong as to constitute abuse of discretion. *The Kermit. Lamborn et al vs. American Ship and Navigation Corp. et al*, 76 Fed. 2d 363 (C. C. A. 9th 1935.) See also *The Kanto Maru., Inger A/S, a corp. vs. Harada Kisen Kabushiki Kaisha*, 112 Fed. 2d 564 (C. C. A. 9th 1940); *Carter Shipping Co. vs. Bowring, Jones & Tidy*, 281 U. S. 515, 50 S. Ct. 400, 74 L. Ed. 1008 (1930); *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 866, 29 L. Ed. 152 (1885); and

Second, the proposition that where an issue lies within the discretion of the trial court, it of course follows that it is not for the appellate court to weigh the conflicting considerations which the trial court had for consideration, or to determine for itself how it would rule on such question, but only to determine whether the trial court's decision was so palpably erroneous that it amounted to an abuse of discretion. See *The Kanto Maru*, cited above.

The Court of Appeals affirmed the judgment of the District Court, which had dismissed the libel on the ground that it had become barred by laches, without extended discussion. *Gardner vs. Panama R. Co.*, 185 F. 2d 730 (C. A. 5th C. 1950) [R. pp. 46, 47]. The Appellate Court said, *inter alia*:

> "The district judge, on the authority of McGrath v. Panama Railroad Co., 5 Cir., 298 F. 303, sustained the defense and dismissed the libel, and libellant is here claiming that it was error to do so.
>
> * * * * *
>
> "In agreement as we are with the opinion of the district judge that laches has barred the action, we find it unnecessary to determine whether the suit should have been dismissed on the first ground urged by respondent that libellant had no cause of action in admiralty because the Tort Claims Act furnished the exclusive remedy."

Petitioner concedes that the case principally relied upon as controlling precedent by both the District Court and the Court of Appeals was *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924) [Petitioner's Brief, p. 13]. In that case, the Libelant, one Anna McGrath, sought to recover damages alleged by her to have been caused by injuries received by her while a passenger on one of this Respondent's steamships, while making a voyage between New York City and the Canal Zone. The libel was dismissed by the then judge of said District Court on the ground of laches. The libel had been filed 40 days after the expiration of a year from the date of the injuries. On appeal to the Court of Appeals for the Fifth Circuit, the decision of the District Court was affirmed, the decision of the Court of Appeals on that point reading as follows [298 Fed. 303]:

> "The applicable statute of limitations for actions at common law for personal injuries in the Canal Zone is one year from the date of the injury. The limitation of three years, which obtains under the Code of Colombia, was superseded by the repealing clause of the legislation and executive orders, which put into effect the Canal Zone Code of Civil Procedure. Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty with the same effect as at common law (as is true in the case of a libel in

personam), after his right to sue at common law had become barred."

In *McGrath*, libelant urged that there had been no injury to respondent from the delay in bringing suit. The Court of Appeals held on that point as follows [298 Fed. at 304]:

> "The appellant suggests that no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury, until the contrary is shown. * * * ."

On the above facts, conditions, and considerations, the Court of Appeals in the *McGrath* case affirmed the lower court's dismissal of the action on the ground that libelant's laches barred the suit. *McGrath* did not hold that an admiralty court is *bound* to dismiss a suit for laches if brought after expiration of the one-year period during which an action at law could have been brought for the same injuries, without regard to whether libelant could show special circumstances excusing his delay and rebutting the presumption of injury to respondent because of such delay [Petitioner in effect concedes this at p. 13 of its Brief]; rather, the court in that case, after full consideratio of libelant's evidence bearing on the questions of excuse and of rebutting of the presumption of injury to respondent resulting from delay, held that on the facts and circumstances of that case, the trial court had not abused its discretion in dismissing the case because of laches, particularly since, in the case of a libel in personam for the recovery of damages for personal injuries, the reason for following by analogy the limitations applicable at law in the courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty, so that

it would be inconsistent to permit him to sue in admiralty, with the same effect as at common law, after his right to sue at common law had become barred. *McGrath* did not hold that *no* exceptional circumstances could establish a satisfactory excuse for delay or rebut the presumption of injury to respondent resulting from delay, but only, that in this class of cases, the character of any alleged special circumstances would have to be more exceptional, and the proof required to sustain such showing would have to be more persuasive in order to show such excuse and rebut such presumption.

The District Court and the Court of Appeals in the case at bar having adopted the *ratio decidendi* of the *McGrath* case, it must be considered that the decisions of the District Court and of the Court of Appeals were founded on and reached by the same analysis as governs the decision in *McGrath;* in other words, that, in the case at bar, the District Court, in the exercise of its admitted discretion, and after a full consideration of all evidence Libelant below was able to produce which would tend to indicate exceptional circumstances justifying the delay and rebutting the presumption of injury to Respondent from delay, concluded from all the facts and circumstances that there was not made out a case strong enough to excuse the delay or rebut the presumption of injury to Respondent resulting from delay, and accordingly dismissed the libel on the ground of laches, particularly since this case, like the *McGrath* case, was the case of a libel in personam for the recovery of damages for personal injuries, in which the reason for following the limitations of the common law in courts of admiralty is particularly strong by reason of the fact that there is preserved to the libelant in such a case, the right to sue at common law as well as in admiralty, so that it would be inconsistent to permit him to sue in admiralty, with the same effect as at

common law, after his right to sue at common law had been barred. The Court of Appeals, following the rationale of its earlier decision in *McGrath*, merely held that the District Court had not abused its discretion in dismissing the libel on the ground that it was barred by laches. In this decision, as in the *McGrath* case, the Court of Appeals did not hold that *no* type of special circumstance would justify a court in departing from the analogy of the statute of limitations at law, but only that, under the circumstances of this case, the District Court did not abuse its discretion in holding that no such departure was warranted.

In the succeeding two portions of this brief Respondent will attempt to show that the decisions in *McGrath* and in the case at bar are in entire harmony with the pertinent decisions of the Court of Appeals for the Second Circuit.

b. *Lincoln vs. Cunard S. S. Co.* (2d Circuit) Applied Same Rule of Law as was Applied in Case at Bar

Petitioner asserts that the decision in the case at bar is in conflict with *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 622 (C. C. A. 2d 1915), by implication representing the holding in that case as constituting the law of the Court of Appeals for the Second Circuit on the point in question. Respondent will attempt to show in this second portion of its brief that *Lincoln* is entirely in accord with the decision in the case at bar.

In the *Lincoln* case Libelant, a seaman (bargemaster), brought suit for injuries sustained by him as a result of a discharge of steam from the side of a vessel. The libel was served four years, seven months and 15 days after the cause of action arose; the analogous statute of limitations at law was three years. Another statutory

provision which the court found pertinent, sec. 405 of the Code Civ. Proc. N. Y., was quoted by the court as follows [221 Fed. at 624]:

> "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; that plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

The court in *Lincoln* stated the general rule respecting the analogy of common law limitations in determining the question of laches, and framed the issue involved in that case, in the following language [221 Fed. at 624]:

> "The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations. Southard v. Brady (C. C.) 36 Fed. 560; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381. The libel having been filed more than a year and a half after the period fixed by the statute had expired, the question presented is whether the circumstances are *so exceptional* as to justify the court in holding that there was no such laches as to her relief. The respondent contends that there is nothing exceptional in the facts, and that libelant's laches has been such as to put the case out of court." [emphasis added]

The chronological development of that case was stated by the court to have been as follows [221 Fed. at 624]:

> "It appears that within two years after the accident an action at law was begun in the United States Circuit Court of the Southern District upon the assumption that Fill was a citizen of New

Jersey and that a diversity of citizenship existed. It was supposed that Fill had become naturalized. This was found to have been error, and the common-law action was dismissed, without any investigation of the merits, on the ground that both plaintiff and defendant were citizens of Great Britain. The dismissal of the action was by the judgment of the Court expressly stated to be without prejudice to the plaintiff's right to proceed in admiralty. The action was submitted by stipulation of the facts on the question of jurisdiction and citizenship only, and was decided by the court without a jury on April 22, 1913. The libel was filed 14 days after the judgment of dismissal in the common-law case. *In substance this was merely a transfer of the controversy from the common-law to the admiralty side of the same court;* the Circuit Court having merged in the District Court January 1, 1912." [emphasis added]

It is submitted that the court's characterization of that case as being "in substance * * * merely a transfer of the controversy from the common-law to the admiralty side of the same court" is significant, when contrasted with the circumstances of the case at bar, where the action at law brought by Petitioner immediately prior to the filing of the present libel against this Respondent was brought against a different defendant, the United States, under the Tort Claims Act.

On the factual circumstances quoted above, the court in the *Lincoln* case made the following conclusion of law [221 Fed. at 624, 625]:

> "Without going further into the matter, *the conclusion we have reached is that the circumstances may be regarded as exceptional*, and that libelant's conduct does not amount to laches, *especially in view of section 405, supra.*" [emphasis added]

The court in *Lincoln* was doubtless also influenced by the further consideration that the libelant in that case was a seaman (bargemaster) and was therefore disposed

to consider his case exceptional, under the well established rule, still in force and effect, that seamen, who historically were often ignorant of their rights, are the wards of admiralty. *Johnson vs. United States*, 186 F. 2d 120, 125 (C. A. 4th C. 1950).

The question of the presumption of injury to respondent does not appear to have been urged in that case or treated by the court.

Respondent respectfully submits that there is nothing in *Lincoln* at variance with the decision in the case at bar. *Lincoln* stated and applied the same general rule respecting the analogy of the statute of limitations at law as was urged and applied in the case at bar; indeed, one of the decisions relied upon in *Lincoln* for the proposition that a court of admiralty, where there is nothing exceptional in the case, will govern itself by the analogy of the applicable limitations at law, namely, *Southard vs. Brady* (cited in the quoted material above), was relied upon by this Respondent in the case at bar. The court in *Lincoln* expressly found that " * * * the circumstances may be regarded as exceptional, and that Libelant's conduct does not amount to laches, especially in view of section 405, supra." Even putting aside the effect of the special statutory provision by which the court in *Lincoln* was expressly influenced, it is submitted as too obvious to require elaboration that the fact that one court reaches the conclusion that the plea of laches is not a bar, after application of a particular set of facts to a general rule of law, whereas another court reaches the conclusion that a suit is barred by laches, after application of the particular facts there involved to the same general rule of law, does not put such *decisions* in conflict. The results differ only because the facts differ. The situation would be different, of course, if the courts had stated, and applied, *different rules of law.*

And, as developed hereinbefore, the scope of review of the Court of Appeals did not extend to reviewing the facts to ascertain whether it would have reached the same conclusion as that reached by the District Court, but merely to determine on the record, as the Court did, whether there was sufficient evidence to support the decision of the District Court as against the contention on appeal that the District Court had abused its discretion.

To summarize this portion of Respondent's argument, its position, briefly, is that there is no conflict between the *Lincoln* case and the decision of the Court of Appeals in the case at bar inasmuch as: (a) both decisions recognized and applied the same rules of law respecting the analogy of the common law limitations in passing upon the question of laches; (b) the facts of each case justified the particular conclusions reached therein; and (c) on the facts the Court of Appeals in the case at bar was correct in ruling in effect that the District Court had not abused its discretion in dismissing the case on the ground that it was barred by laches.

c. The Rule of Law of the Second Circuit is Substantially the Same as That Applied in the Case at Bar

As representing the rule of the Court of Appeals for the Second Circuit on the issue of laches involved in the case at bar, Petitioner cites only *Lincoln vs. Cunard S. S. Co.*, cited above. Petitioner chooses to ignore a number of available, more recent decisions of the Second Circuit on the issue at bar, several of which were relied upon by this Respondent both in the District Court and on appeal to the Court of Appeals, and which, it is submitted, demonstrate unmistakably that the

rule of law respecting the analogy of the statute of limitations in passing upon the defense of laches in admiralty in the Second Circuit is substantially the same rule as that applied in the Fifth Circuit, and, more specifically, that which was applied in the case at bar.

There follows an analysis of the principal legal principles involved in the case at bar, and a comparison of the holdings of the Court of Appeals for the Second Circuit respecting such principles of law:

As aforesaid, Petitioner has not contested in this case that the question of whether or not a suit in admiralty is barred by laches lies within the sound discretion of the admiralty court. In the exercise of such discretion the courts are guided by certain well established principles. One of these is that, as a general rule, an admiralty court will adopt by analogy the statute of limitations of the State in which the suit in admiralty is brought, in the absence of exceptional circumstances justifying or excusing the delay and rebutting the presumption of damages to respondent resulting from such delay. *Hughes vs. Roosevelt*, 107 Fed. 2d 901 (C. C. A. 2d 1939); *Frame vs. City of New York*, 34 Fed. Supp. 194 (DC SD NY 1940); *Pope vs. McGrady Rodgers Co.*, 70 Fed. Supp. 780 (DC Penn. 1947), affirmed 164 Fed. 2d 591 (C. C. A. 3d 1947); *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551 (C. C. A. 2d 1930); *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200 (C. C. A. 9th 1934); *Southard vs. Brady*, 36 Fed. 560 (CC NY); *Scull vs. Raymond*, 18 Fed. 547 (DC SD NY); *Davis vs. Smokeless Fuel Co.*, 182 Fed. 1004 (D. C. N. Y. 1910) [affirmed, *Davis vs. Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2d 1912)]. The cited cases are those which were relied upon by this Respondent on appeal

to the Court of Appeals in the case at bar; it will be noted that all but three of them arose in the Second Circuit. The court in *Marshall* (a Second Circuit case) discussed and adopted the analysis of *McGrath vs. Panama R. Co.* Likewise, the court in *Westfall Larson & Co. et al* (Ninth Circuit) cited the *McGrath* case, among others, in declaring the aforementioned general rule, referring thereto in the following language [73 Fed. 2d at 203]:

> "The rule was lucidly expounded by Judge Grubb in McGrath v. Panama R. Co. (C. C. A. 5) 298 F. 303, 304:
>
> 'Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. * * * '"

It is further noteworthy that among the other cases cited in support of this general rule by the court in *Westfall Larson & Co.* was *Lincoln vs. Cunard S. S. Co.* (Second Circuit), which Petitioner has asserted is in conflict with the case at bar. The court in *Westfall Larson & Co.* referred to the *Lincoln* case in the following terms [73 Fed. 2d at 203]:

> "Again, in Lincoln v. Cunard S. S. Co. (C. C. A. 2) 221 F. 622, 624, we find the following language:
>
> 'The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations.'"

It is submitted that it is clearly apparent from the foregoing authorities that the decisions of the Court of Appeals for the Second Circuit (as well as those of the Court of Appeals for the Ninth Circuit) are in accord with the decisions of the Court of Appeals for the Fifth Circuit, and, more particularly, with the decision of

the Court of Appeals in the case at bar, on the fundamental legal principle involved, namely, that an admiralty court in passing upon the issue of laches will adopt by analogy the analogous statute of limitations at law, except when there are exceptional circumstances present in the particular case which warrant a departure therefrom.

What particular circumstances will move a court in its discretion to depart from the analogy of the analogous statute of limitations at law can of course not be definitively stated inasmuch as each such decision necessarily depends upon the particular facts and circumstances of each case.

However, there is persuasive authority that in a libel in personam for personal injuries, such as the case at bar, particularly strong reasons exist for following the limitation at law by analogy. In such cases, a court sitting in admiralty will be less likely to depart from the analogy of the limitation at law because, since libelant has a right to sue at law, as well as in admiralty, it would be inconsistent to permit a libelant to sue in admiralty with the same effect as at law, after his right to sue at law is barred. *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Pope vs. McGrady Rodgers Co.*, 70 Fed. Supp. 780 (D. C. Penn. 1947), affirmed 164 Fed. 2d 591 (C. C. A. 3d 1947); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551 (C. C. A. 2d 1930); *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200, 203 (C. C. A. 9th 1934). Significantly, the court in *Marshall*, a Second Circuit case, analyzed and adopted expressly the rationale of the *McGrath* case, on the above point, stating as follows [39 Fed. 2d at 552]:

> " * * * In McGrath v. Panama R. R. Co., 298 F. 303 (C. C. A. 5), * * * the court emphasized the inconsistency of permitting a plaintiff,

who may sue either in a common-law court or a court of admiralty, to maintain his action in the latter court after his right to sue in the former has been lost by delay. It also emphasized that detriment to the adverse party is presumed from delay for the statutory period unless the contrary be shown."

The above principle amounts to no more than a requirement by the courts, in a case involving a claim for personal injury in which a remedy at common law also existed, that there be a *stronger, more persuasive,* showing of special circumstances before an admiralty court will depart from the analogy of the statute of limitations applicable at law. In other words, stronger special circumstances must be proved showing Libelant's excuse for delay and rebutting the presumption of injury to respondent which results from delay. On this point, again, then, the Second Circuit is expressly in accord with the holding in the Fifth Circuit in the case at bar. On the appeal in the case at bar, as aforesaid, it was not for the Court of Appeals to ascertain on the particular facts whether such facts justified a departure from the analogy of the statute of limitations applicable at law, but merely to determine whether the District Court, in ruling that under the particular facts and circumstances the Libelant had not shown facts sufficient to show excuse, was clearly guilty of an abuse of discretion.

Further, the rule of law of the Court of Appeals for the Second Circuit, in a case such as the case at bar, is in accord with the decisions of the Court of Appeals for the Fifth Circuit in holding that injury to respondent is presumed from delay in filing the libel. *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551, 552 (C. C. A. 2d 1930); *Redman vs. United*

States, 176 Fed. 2d 713, 715 (C. A. 2d C. 1949); *Redman vs. United Fruit Co.*, 185 Fed. 2d 553 (C. A. 2d C. 1950).

Redman vs. United Fruit Co., which appears to be the latest reported expression of the Court of Appeals for the Second Circuit on this point, holds in effect that before a court in admiralty may refuse to follow the local statute of limitations, libelant's evidence must clearly rebut the presumption of detriment to respondent which results from libelant's delay.

It is respectfully submitted that the foregoing analysis clearly demonstrates that the pertinent decisions of the Court of Appeals for the Second Circuit are in complete accord with the decisions of the Court of Appeals for the Fifth Circuit, and, more particularly, with the decision of the Court of Appeals in the case at bar.

Conclusion

By way of summary of the principal points made in this brief, it is submitted that the above citations of authority, argument, and analysis demonstrate unmistakably that the decision of the Court of Appeals for the Second Circuit in *Lincoln vs. Cunard S. S. Co.*, stated by Petitioner to be in conflict with the decision in the case at bar, is, on the contrary, entirely in harmony therewith, and that, further, available pertinent decisions of the Court of Appeals for the Second Circuit, which Petitioner has chosen to ignore, indicate clearly that the decisions of the Court of Appeals for the Second Circuit pertinent to the questions involved in the case at bar, are entirely harmonious and consistent therewith.

WHEREFORE, Respondent prays that the petition for review on writ of certiorari be denied and that the

costs of this brief be added to the costs heretofore taxed against Petitioner and in favor of this Respondent in the Court of Appeals.

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MR 44641—Panama Canal—4-24-51—80

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RESPONDENT'S BRIEF

IN THE

Supreme Court of the United States

October Term, 1951

No. 22

EVELYN G. GARDNER,

Petitioner,

vs.

PANAMA RAILROAD COMPANY,

Respondent.

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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No. 22

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Petitioner,

vs.

PANAMA RAILROAD COMPANY

Respondent.

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

History of the Case

This case is before the Court on writ of certiorari granted May 21, 1951, to review the decision of the United States Court of Appeals for the Fifth Circuit in appeal No. 13,259, in admiralty, 185 Fed. 2d 730 (C. A. 5th C. 1950) [R. p. 33], which affirmed the judgment of the United States District Court for the Canal Zone [R. p. 23] dismissing the libel on the ground of laches.

The Respondent, Panama Canal Company (formerly Panama Railroad Company) is a corporate agency and instrumentality of the United States, existing for the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone, with capacity to sue and be sued, and with principal offices in New York,

N. Y. and in the Canal Zone. Panama Canal Company Act, consisting of sections 245 through 258 of title 2 of the Canal Zone Code (48 U.S.C. secs. 1361–1361*l*) enacted by Act June 29, 1948, ch. 706, 62 Stat. 1076, and amended by Act Sept. 26, 1950, ch. 1049, secs. 5 et seq., 64 Stat. 1041. (See also Executive Order 10,263, June 29, 1951, 16 F.R. 6333, concerning the effective date of the Act of September 26, 1950.)

Prior to the Panama Canal Company Act, the Respondent corporation was organized under the laws of the State of New York; all of its stock was owned by the United States Government; and it at all times acted, in accordance with its primary function so to act, as an instrumentality or agency of the United States. Among its other activities, Respondent operates the Panama Line, a freight-passenger steamship line of three vessels between New York, N. Y. and Cristobal, C. Z. The line is operated primarily to provide freight service for the Canal Zone Government, the Panama Canal Company, and the Armed Forces and other Government agencies located in the Canal Zone, and to provide a regular passenger service for the employees of such Government agencies and organizations to and from the Isthmus.

On December 3, 1947, while voyaging from New York to Cristobal as an authorized passenger aboard the S. S. *Panama*, one of the three vessels operated by the Respondent, the Petitioner sustained a fall in the bathroom of her stateroom and suffered certain alleged injuries which are the basis for this suit and which were also the basis for each of two earlier actions at law, one against this Respondent as Defendant, and the other against the United States as Defendant under the Federal Tort Claims Act, both of which actions were dismissed before going to trial on the merits. As is developed in Petitioner's brief (p. 3) Petitioner's action

at law against this Respondent as Defendant was dismissed on October 7, 1948, the District Court sustaining the defense that the Court was without jurisdiction over the subject matter of the suit because of the applicability of the Federal Tort Claims Act to tort claims against the Defendant, the Panama Canal Company. An appeal from this judgment was taken but later dismissed by agreement of counsel for the parties. Petitioner's subsequent action against the United States under the Federal Tort Claims Act, as developed in Petitioner's brief (p. 5), was also dismissed for want of jurisdiction by judgment dated October 14, 1949 [R. p. 29] before trial on the merits. Congress having enacted Public Law 172, 81st Congress, approved July 16, 1949, ch. 340, 63 Stat. 444, which by specific amendment to section 2680 of title 28, United States Code, amended the Tort Claims Act by adding to the list of exclusions from the scope of that Act "(m) Any claim arising from the activities of the Panama Railroad Company."

Following these two dismissals, Petitioner on October 19, 1949, filed the present libel in admiralty against this Respondent [R. p. 1]. On November 23, 1949, Respondent filed a "Plea to the Jurisdiction of the Subject Matter," which plea challenged the District Court's jurisdiction over the subject matter on the ground, briefly, that no substantive cause of action had ever arisen against this Respondent as a result of the injuries alleged, since at the time of such injuries the only right which could possibly have accrued to the Petitioner was a right against the United States, as such entity, under the Federal Tort Claims Act. That plea to the jurisdiction was overruled by order of the District Court filed February 15, 1950 [R. p. 14]. Following the failure of the District Court to dismiss the case for lack of jurisdiction over the subject matter, Re-

spondent on February 27, 1950, filed its answer [R. p. 15], in which the defense of laches was asserted. After the issue of laches was tried separately pursuant to stipulation by the parties dated March 13, 1950 [R. p. 18], the District Court sustained the defense of laches and accordingly entered judgment on April 6, 1950, dismissing the libel [R. p. 23].

On Petitioner's appeal to the Court of Appeals for the Fifth Circuit, the Appellate Court affirmed the judgment of the District Court dismissing the case on the ground of laches [R. p. 31 (Opinion); R. p. 33 (Judgment)], and found it unnecessary to pass upon the question of jurisdiction over the subject matter.

Petition for writ of certiorari was filed by the Libelant on March 27, 1951, and granted May 21, 1951.

Questions Involved

The issues raised in the case are two:

(1) Did the District Court have jurisdiction over the subject matter of the suit [the District Court ruled that it did, and the Court of Appeals found it unnecessary to rule on that question in view of its ruling on the question of laches; Respondent contends that the District Court's ruling on this point was erroneous as a matter of law and urges lack of jurisdiction over the subject matter as an additional ground for sustaining the dismissal of the suit]; and

(2) Was the Court of Appeals clearly in error in ruling that the District Court did not abuse its discretion in dismissing the case on the ground of laches?

ALLEGATIONS OF ERROR

Respondent assigns as error the order of the District Court dated February 15, 1950 [R. p. 14], overruling Respondent's motion to dismiss the suit for lack of jurisdiction over the subject matter, on the ground that the Court's order was erroneous as a matter of law.

[On this review Respondent relies for an affirmance of the Court of Appeal's judgment of December 14, 1950, R. p. 33, affirming the District Court's judgment of April 6, 1950, R. p. 23, dismissing the libel, not only upon the ground stated in said judgments, to wit, that the suit is barred by laches, but also on the ground that the District Court was without jurisdiction over the subject matter of the suit.]

ARGUMENT

First issue: Did the District Court have jurisdiction over the subject matter?

Summary: In maintaining that the District Court lacked jurisdiction over the subject matter, Respondent takes the position that no cause of action, at law or in admiralty, ever arose against the Respondent, Panama Canal Company, on the basis of Petitioner's alleged injuries on or about December 3, 1947, because:

(a) at that time any cause of action arising therefrom either at law or in admiralty necessarily arose exclusively against the United States, as such entity, under the Tort Claims Act; and

(b) Public Law 172, 81st Congress, approved July 16, 1949, ch. 340, 63 Stat. 444, excluding the Panama Canal Company from the Tort Claims Act, has prospective effect only and does not retroactively create any cause of action against the Respondent and, of course, could not "revive" a cause of action that had never arisen.

a. Non-existence of any cause of action against Respondent

The first question presented is that of the jurisdiction of the District Court over the subject matter, which Respondent has contested both in the District Court and in the Court of Appeals. It is settled law

that on certiorari to a Court of Appeals, it is the duty of the Supreme Court to inquire into the jurisdiction over the subject matter of the courts below, even in cases where no question in respect thereof has been raised by the parties. *Shanferoke Coal and Supply Corp. vs. Westchester Service Corp.*, 293 U. S. 449, 451, 452, 55 S. Ct. 313, 79 L. Ed. 583; *Great Southern Fire Proof Hotel Co. vs. Jones*, 177 U. S. 449, 453, 20 S. Ct. 690, 691, 692, 44 L. Ed. 842. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review. *Mitchell vs. Maurer*, 293 U. S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338. Lack of jurisdiction of the subject matter may be considered and appropriate judgment given, at any stage of the proceedings either in the Supreme Court or below. *Matson Nav. Co. v. United States*, 284 U. S. 352, 52 S. Ct. 162, 76 L. Ed. 336.

Respondent contends on the question of the District Court's jurisdiction, that no cause of action arose against it from the injuries alleged in the libel herein, since, at the time of the injuries complained of (December 3, 1947), Respondent was not suable in tort, because the Federal Tort Claims Act (now reenacted principally as sections 2671–2680, and section 1346 (b) of Title 28, U. S. Code) provided the exclusive judicial remedy for personal injuries caused by the negligence or wrongful act or omission of any officer or employee of the Panama Canal Company. Had such alleged injuries been sustained prior to August 2, 1946, the date of approval of the Tort Claims Act, suit thereon could have been maintained against Respondent because of its general power to sue and be sued in its corporate name [see section 248 (d) of title 2 of the Canal Zone Code as added by the Panama Canal Company Act, June 29, 1948, ch. 706, 62 Stat. 1075, 48 U. S. Code 1361d (d)—which Act was amended, as aforesaid, by

Act Sept. 26, 1950, ch. 1049, secs. 5 et seq., 64 Stat. 1041—for Respondent's present power to sue and be sued]. After August 2, 1946, such suit could only be brought against the United States, as such entity, because the Tort Claims Act was made the exclusive remedy for such tort causes of action, and the suability of Respondent in tort was thus withdrawn by Act of Congress (28 U. S. Code 2679). In Respondent's view that withdrawal meant that for such tort no substantive cause of action could arise against the Respondent since, where the waiver, or withdrawal of a waiver, of sovereign immunity is involved [as it is here, the Respondent being an agency and instrumentality of the United States and therefore partaking of its sovereign immunity], it is not realistic to contend that a substantive right of action arises or can exist against a person who is immune from suit and against whom no judicial remedy can be pursued, since a substantive right for which the law affords no means of vindication or redress would be an illusory concept, useless and worthless. It follows that no substantive right could have arisen against the Panama Canal Company, Respondent, at the time of the alleged injuries, since there existed no judicial remedy which could have been pursued against Respondent. Respondent's position on this issue, on which the question of jurisdiction turns, was very concisely and forcefully expressed by the Court in *Commissioners of the State Ins. Fund v. United States*, 72 F. Supp. 549. The Court there had expressly presented to it the question of whether a cause of action against the United States under the Federal Tort Claims Act arose on July 28, 1945, the date of the injuries, or on August 2, 1946, the date on which the enactment of the Tort Claims Act made the United States liable (retroactively to January 1, 1945) for the first time for the type of injuries there involved. The

issue had to be squarely decided, for depending upon the determination of that point, plaintiffs' right to sue would or would not have passed to a third party under applicable New York statutes, the express terms of which are not here pertinent. In holding that the right of action accrued *on August 2, 1946, when the United States for the first time became suable*, rather than upon the earlier date of the injuries, Associate Justice Holtzoff, sitting by designation, stated at p. 554:

> "To analyze further the argument of the Commissioners their contention would seem to be that a substantive right of action against the United States existed although it was unenforceable because of the sovereign immunity. The books are replete with discussions of the difference between the concept of a cause of action and the remedy by which it can be enforced. In the light of the voluminous literature on this subject, any extensive consideration of this somewhat theoretical topic would be hardly appropriate. *Suffice it to say that to contend that a substantive right of action exists against a person who is immune from suit and against whom no judicial remedy can be pursued, is not realistic.* A substantive right for which the law affords no means of vindication or redress would be useless and worthless. Such a nebulous right would be but a phantom. *In my opinion the immunity of the United States from suit necessarily implies that no substantive right of action existed against it, and not that there was merely a procedural impediment against its enforcement.*" [Emphasis added.]

Petitioner does not deny that [as the District Court held in the earlier action at law brought against this Respondent as Defendant on the same facts, Civil No. 2807, R. p. 28], at the time of the alleged injuries, suit under the Tort Claims Act against the United States *as such entity* was the only judicial proceeding which could be brought on the basis of the alleged injuries.

Petitioner does not deny, therefore, that said earlier civil action brought against this Respondent as Defendant was properly dismissed. Nor does Petitioner at any point make any claim that this suit, having been brought in Admiralty rather than at law, is any more maintainable than an action at law would have been, except as it enables the Petitioner to avoid the automatic application of the one-year statute of limitations which applies to this class of suits in an action at law. Petitioner appears to contend, however, that at the time of the alleged injuries there arose in favor of Petitioner and against the Respondent, Panama Canal Company, a substantive right, notwithstanding Congress had, by enactment of the Tort Claims Act, declared that the Panama Canal Company was thenceforward not to be suable for such torts. It is this alleged substantive right which Petitioner now purports to be suing on—a right, Petitioner urges, which a subsequent chain of circumstances and events (principally, the amendment of the Tort Claims Act made by Public Law 172, 81st Congress, approved July 16, 1949, so as to exclude from its purview any "claim arising from the activities of the Panama Railroad Company") have now transformed into a more tangible thing, i. e., an alleged right of action which can now be sued on.

Before discussing further Petitioner's theory of "revival" or "bringing to life" of a more or less "dormant" substantive cause of action which it alleges came into being against Respondent, it is desired to develop more fully Respondent's argument that no such cause of action ever existed or could exist against Respondent in any real sense.

Respondent contends that the distinction between "substantive" and "procedural" law which is drawn by courts, most frequently in conflict of laws cases, does not apply to cases in which the United States has per-

mitted itself or its agency or instrumentality to be sued and that such distinction in no way supports Petitioner's position that a "substantive" cause of action arose against Respondent at the time of the injuries. When a court sitting in one state (the forum state) is called upon to determine a cause of action which arose under the laws of a foreign state, it is generally held under conflict of laws rules that those matters which relate to substance, sometimes called "matters of right," are governed by the law of the place where the transactions occurred out of which the claim in litigation arose, while those matters which relate to the procedure of the court, or "matters of remedy," are governed by the law of the forum state. Goodrich, *Conflict of Laws*, second edition, sec. 77, p. 187, et seq. Even in conflict of laws cases and in other cases where the concept is employed, however, courts recognize that the distinction between "substantive" and "procedural" law has validity only for certain limited purposes, and is often quite tenuous. Justice Holmes has said, "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." Holmes, *The Common Law* (1881), p. 253. In *The Modern Law of Evidence* (1912), section 171, Chamberlayne repudiates the distinction in the following terms: "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to us it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; i. e., no law at all. While it may be convenient to distinguish between the right or liability, the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy

is applied to the right, on the other, i. e., between substantive law and procedural law, it should not be forgotten that, so far as either is law at all, it is the litigant's right to insist upon it, i. e., it is part of his right. In other words, it is substantive law." It is submitted that the holding in the *Commissioners* case, cited and discussed above, is in complete harmony with this view.

It is a well-established, elementary principle that any right to sue the United States or any of its agencies or instrumentalities is not a vested right protected by the Constitution, but merely a privilege which must first be granted in order to exist at all, and which, once created, may be withdrawn or modified whenever and to whatever extent the Congress in its discretion may determine. *Huff v. United States*, 22 F. Supp. 309; *Maricopa County et al v. Valley National Bank of Phoenix*, 318 U. S. 357, 363, 63 S. Ct. 587; *Hornbeck et al v. Bain Mfg. Co.*, 7 F. R. D. 605, 607; *Smith et al v. American Can Co.*, 8 F. R. D. 112; *Dismuke v. U. S.*, 297 U. S. 167, 56 S. Ct. 400. That Congress may endow a Government corporation with the Government's immunity is clear. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 59 S. Ct. 516 (1939).

It must therefore be apparent that there is no right of any kind, in any real sense, against the United States or any of its agencies or instrumentalities, until, and only to the extent that, the sovereign permits itself or such agency or instrumentality to be sued. To paraphrase the words of the Court in the *Commissioners* case, cited and quoted from above, the immunity of the United States from suit necessarily implies that no substantive cause of action can arise against it, and not that there is merely a procedural impediment to its enforcement.

While courts do employ the language "substantive"

and "procedural" because they find it convenient to do so for some limited purposes, it is submitted that the considerations pertinent in cases where the language is employed are not pertinent with respect to the Tort Claims Act or any other Act of Congress involved in this suit. Any right against the United States, or its agency or instrumentality, either "substantive" or "procedural," can arise only by virtue of an Act of Congress.

The Petitioner's theory, that there can be created a substantive right against the United States or one of its agencies before Congress passes an Act permitting itself or such agency to be sued in any given, defined circumstances, involves the assumption that the *laws of a state* can give rise to some sort of right against the United States in advance of Congress' declaration. But that is an impossible assumption, since it is accepted as incontrovertible that no state can by its laws (either statutory or common law) create any right, either "substantive" or "procedural" as against the United States or its agencies or instrumentalities. The very nature of our Federal structure of government precludes that possibility since the powers reserved to the several states by the Constitution of the United States do not include any power to create such rights, either "substantive" or "procedural," against the United States. No right against the sovereign existed at English common law, where the concept of sovereign immunity was expressed by the apt aphorism "The King can do no wrong." The United States, of course, is likewise clothed with sovereign immunity from suit. *Keifer* case (cited supra) at p. 388, and *Commissioners* case (cited supra) at p. 552, and cases cited. It follows, therefore, that any right which can be enforced by suit against the United States can only be derived from the express or implied consent of Congress. Until Congress

provides that for given acts or omissions the United States will henceforth be suable, under specified circumstances, there is no *right* against the Government. When such consent is granted, there arises at once a right which can be enforced in the manner and in such courts or administrative tribunals as the act prescribes. Such right, however, as aforesaid, is not a vested right but merely a privilege which can be withdrawn or modified at any time. The scope of the act of concession is as great and no greater than that defined in the act itself. Thus, for example, it has been held that the Federal Tort Claims Act authorizes suit against the United States only in so far as the Act expressly so provides, and that jurisdiction over such suits is limited to the terms of the consent given, which cannot be enlarged by judicial interpretation. *Brunell v. U. S.*, 77 F. Supp. 68; *Lazier v. U. S.*, 77 F. Supp. 241. The fact that it is the act of Congress which creates the right is not altered by the circumstances that such an act may, as does the Tort Claims Act, provide that the act shall extend in scope to acts or omissions which are torts under "the law of the place where the act or omission occurred." The basic fact remains that it is the United States Congress which *creates and defines the scope of such right*, notwithstanding that it may do so through the mechanism of adopting as its law, by reference, the "law of the place where the act or omission occurred." And it is no answer to this argument to say that a "substantive" right against the United States can arise under the law of a state before Congress' waiver of immunity from suit without violation of that Constitutional principle, since the "right" can not be enforced until Congress does waive immunity, for such an answer only points out the unreal, wholly illusory, nature of the alleged "substantive" right. To borrow again the language of Justice Holtzoff from the

Commissioners case, supra, "such a nebulous right would be but a phantom."

It is submitted that the principles of law discussed require the conclusion that no cause of action in tort can ever arise against an agency of the United States, such as Respondent, unless at the time of the events relied upon to form the basis of the alleged cause of action there was a subsisting right to sue such agency on such alleged cause of action. In the instant case, therefore, no cause of action can be said to have arisen against the Panama Canal Company on December 3, 1947, when the accident involved occurred, because at that time there was admittedly no subsisting right to sue the Company, as expressly held by the District Court in Civil No. 2807, the Tort Claims Act of August 2, 1946, having expressly withdrawn such right. The assertion that a "substantive" right arose in this case against Respondent and that such right was merely unenforceable because of a "procedural" immunity to suit, cannot, it is submitted, be maintained in the face of the aforesaid basic principle that so far as concerns the sovereign in tort cases, at least, there is no right in any real sense unless there is a remedy. In Respondent's view, therefore, from the time of the enactment of the Tort Claims Act in 1946 to the enactment of Public Law 172 in 1949, no right, either "substantive" or "procedural," arose or existed against the Panama Canal Company in any tort case covered by the exclusive provisions of the Tort Claims Act. Substance and procedure are necessarily merged in reference to any tort action against the sovereign.

In support of the view that application of the Tort Claims Act to the Panama Canal Company operates solely as a procedural bar to direct suits against that Company, Petitioner cites only *Wiltse vs. United States*, 74 Fed. Supp. 786, at 787, without analysis or discus-

sion [Petitioner's Brief p. 13]. The language of the *Wiltse* case presumably relied upon by Petitioner is certain general language to the effect that "the Federal Tort Claims Act does not create a cause of action, but waives *pro tanto* the sovereignty of the United States to permit suits of torts committed by agents and employees of the Government, * * * ." The question involved in *Wiltse* was whether a one-year Louisiana statute of limitations which the courts of that State had construed as peremption instead of prescription or limitations, or the period of limitations prescribed by the Federal Tort Claims Act, would govern. The Court held that the period prescribed by the Federal Tort Claims Act, which in that case happened to be longer, governed. It is submitted that the language of the Court presumably relied upon by Petitioner is at best only dictum, and that all that such language is really intended to say, when read in context, is that, of course, the Tort Claims Act does not expressly define the elements of tortious conduct which give rise to a tort cause of action, but rather does so simply by reference to the law of the particular state in which the alleged tortious conduct occurs. As developed hereinbefore, it is submitted that such circumstances, that is, that the elements of tortious conduct are defined by reference to state law, should not serve to obscure the essential fact that it is nonetheless the United States Congress which creates the substantive right by permitting the United States to be sued, and that *no right* of any kind can arise against the United States or its agency or instrumentality until Congress does waive sovereign immunity. It is submitted that the Court's conclusion and rationale in the *Commissioners* case, cited and analyzed above, in which the question of whether any "substantive" rights *could* antedate the coming into effect of the Tort Claims Act was directly involved in

and determinative of the case, are far more persuasive than the vague and generalized statement included in the *Wiltse* case.

If Respondent's view that no right can arise against an agency of the United States until the United States waives the immunity of such agency to suit is correct, and it is strongly urged on the basis of the above analysis that no other conclusion can be reached, the practical effects of the enactment of the Tort Claims Act, as related to this case, were as follows, from and after approval of the Act on August 2, 1946:

(1) No cause of action for injuries of the type incurred by Petitioner could arise against Respondent, Panama Canal Company, since that Act was expressly made exclusive within the field of its coverage and expressly *withdrew absolutely the right formerly extended to sue the Respondent* for such injuries (28 U. S. Code 2679), and created a new, and unrelated, right to sue the United States, as such entity, pursuant to the procedures prescribed by said Act. Under the principles of law discussed above, there can be no question but that the United States had complete authority to withdraw absolutely the right to sue the Respondent for such act or omissions of its officers and employees. It could, unquestionably, have withdrawn such right even without substituting the right made available under the Tort Claims Act;

(2) The injuries sustained by Respondent on *December 3, 1947*, therefore gave rise to a cause of action, if at all, only against the United States, as such entity, under the Tort Claims Act.

b. Prospective effect of Public Law 172, 81st Congress

The second part of Petitioner's argument is that the enactment of Public Law 172, 81st Congress, *approved*

July 16, 1949, ch. 340, 63 Stat. 444, which amended the Tort Claims Act so as to except from its purview" * * * Any claim arising from the activities of the Panama Railroad Company," operates so as to permit Petitioner now to bring suit against the Respondent (Panama Canal Company) to enforce the cause of action which it urges arose against Respondent at the time of the alleged injuries in 1947 notwithstanding the application of the Tort Claims Act. Petitioner does not urge that Public Law 172 of itself has any retroactive effect, and that question is therefore not discussed here at length. Suffice it to say that the general rule that statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed, is well settled. *Brewster vs. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457. See generally cases sited under section 263 of Title 59 (Statutes) of the Federal Digest at page 637 et seq. This Court has held that laws are not to be construed as applied to cases which arose before their passage, unless that intention be clearly declared. *Shwab vs. Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454. It has been held that retroactivity, even where permissible, is not favored except on the clearest mandate. *Claridge Apts. Co. vs. Commissioners of Internal Revenue*, 232 U. S. 141, 65 S. Ct. 172, 89 L. Ed. 139. There is an almost conclusive presumption against the power to take retroactive action under a statute unless Congress plainly specifies such power. *Trans. & Western Air vs. Civil Aeronautics Board*, 169 Fed. 2d 893, 83 U. S. Ap. D. C. 358 (C. A. D. C. 1948). A statute, to be construed as operating retrospectively, must not only clearly appear so to operate, but its retrospective character must be derived from the unequivocal import of the terms and manifest intention of the legislature. *U. S. vs. McKinney*, 107 Fed. 2d 879 (C.

C. A. Ohio 1939). This rule against the retroactive application of statutes applies fully as strongly to amendatory Acts as it does to statutes generally. *Dodge vs. Nevada National Bank of San Francisco*, 109 Fed. 726, 48 C. C. A. 626 (C. C. A. Cal. 1901), holding that an amendatory Act could not be given retroactive effect in the absence of language so declaring, even though it was the intention of the supporters of the bill that it should operate retroactively.

Petitioner contends only that the enactment of Public Law 172 now permits her to sue Respondent on the cause of action she urges arose against Respondent at the time of the alleged injuries. Respondent's reply to that, of course, is that no such cause of action did arise or could have arisen, for the reasons developed hereinbefore.

Petitioner makes considerable point of urging that the intent of Congress would be defeated by a holding that Public Law 172 applies prospectively only and does not serve to give Petitioner a cause of action against Respondent where none arose at the time of the injuries. The plain fact of the matter is that Congress, with respect to Petitioner's action then pending against the United States as such entity under the Tort Claims Act—as distinguished from its general intent to provide that, prospectively, the tortious acts or omissions of the Panama Canal Company or of its employees should give rise to a cause of action against the Company rather than against the United States under the Tort Claims Act—had no intent whatsoever, for the simple reason that the matter had not been brought to its attention. The legislative history cited by Petitioner discloses nothing more than the reasons for which it was desired to except the Panama Canal Company from the scope of the Tort Claims Act, *prospectively* (see United States Code Congressional Service, 1949,

Vol. 2, p. 1589, for House Committee Report No. 830). Those reasons were in no way concerned with any pending actions but were concerned only with the general unsuitability of the Tort Claims Act for the business-type operations of the Panama Canal Company, in view of the many practical considerations explained at length in the cited report. The legislative history evidences in no way any consideration of or intent concerning this Petitioner's situation, but merely confirms that Congress decided that it would be preferable to include the Panama Canal Company among the excepted agencies, for the reasons discussed in the report, and did so from and after July 16, 1949, by enactment of said Public Law 172. The legal result was that Petitioner's judicial remedy was cut off, no provision having been included in Public Law 172 to save such remedy. Had the matter of such pending actions been brought to Congress' attention it is practically a certainty that the legislation would have expressly covered such pending actions, and it must fairly be conceded that, in view of the legislative purpose of Public Law 172, Congress would have saved such pending causes of action, most probably, by providing that they could be litigated to conclusion under the Tort Claims Act. But the courts cannot legislate judicially even where Congress' failure to legislate was likely due to inadvertence.

Petitioner suggests that it would be an injustice to rule that the District Court lacked jurisdiction over the subject matter and that it certainly could not have been the intention of Congress to deny Petitioner the opportunity to have her claim tried on the merits. Although Respondent appreciates Petitioner's difficulties in getting her day in court on the merits of her case, it is submitted, as aforesaid, that what the intention of Congress might have been had it considered the

situation, and what if anything Congress might have done by way of inserting a savings clause in Public Law 172, are not germane to the legal issue now involved; namely, in view of what Congress actually did, does the District Court have jurisdiction over the subject matter of this suit (that is, does any right of action exist). The simple fact is that it is Congress' failure to have included a savings clause in favor of pending causes of action among the provisions of said Public Law 172 which puts Petitioner out of court, and only Congress can now provide that she shall have her day in court. If there is any injustice in Petitioner's inability to obtain a trial on the merits—and it is not entirely clear that there is in view of the settled doctrine that Congress can withdraw its "waiver of immunity" at will, that is, that there is no "vested right" in the continuance of such waiver—her appropriate remedy is by appeal to the Congress. It is respectfully submitted that it is not for the Courts to bend and twist the settled principles of law in order to fashion a conclusion in aid of a litigant whose proper remedy, if he has any, lies elsewhere.

In brief summary, Respondent's position with respect to the effect of the enactment of Public Law 172 on this suit is as follows:

(1) The right to sue the United States as such entity for injuries of the kind sustained by libelant was withdrawn absolutely. This served to withdraw such right to sue the United States even with respect to the pending cause of action, since there was no savings clause, as held by the Court below in Civil No. 2930 [R. p. 29].

(2) Public Law 172, *prospectively*, from and after its effective date, July 16, 1949, has the effect of authorizing persons to sue Respondent, Panama Canal Company, for injuries sustained after said effective date, in

accordance with the consent to be sued contained in its corporate charter. Since Public Law 172 was not by its terms retroactive, it authorizes suit against the Panama Canal Company only with respect to injuries which occur *after* the effective date of the Act.

Conclusion on First Issue

It is respectfully submitted that it follows from the principles of law discussed above and applied to the case before the Court that the District Court had no jurisdiction over the subject matter, that it was error for the District Court to rule that it had such jurisdiction, and that the dismissal of the case, ordered by said Court below on the grounds of laches and affirmed by the Court of Appeals, should be affirmed by this Court on the jurisdictional issue as well as on the laches issue.

Second Issue: Was the Court of Appeals clearly in error in ruling that the District Court did not abuse its discretion in dismissing the case on the ground of laches?

Summary: The question of whether a suit in admiralty is to be dismissed on the ground of laches rests in the sound discretion of the trial court; under the facts and circumstances of this case, the court properly dismissed the case on the ground of laches and was clearly guilty of no abuse of discretion in so doing, and the Court of Appeals properly affirmed such dismissal. More particularly, Respondent urges that in a libel in personam for the recovery of damages for personal injuries, the reasons for following the limitations of the common law in courts of admiralty are emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law as well as in admiralty, so that it

would be inconsistent to permit the libelant to sue in admiralty, with the same effect as at common law, after his right to sue at common law has become barred.

It is submitted that Petitioner's stated view of the holding of the Court of Appeals in the case at bar, to the extent that it suggests by implication that the Court held that the District Court was *bound* to dismiss the suit brought in admiralty because the libel was filed after expiration of the one-year period during which an action at law could have been brought for the same injuries, without regard to whether Petitioner (Libelant in the District Court) could show exceptional circumstances excusing its delay and rebutting the presumption of injury to Respondent resulting from such delay, is demonstrably erroneous.

The issue respecting laches which was before the Court of Appeals was the simple question of whether the District Court had *abused its discretion* in dismissing the libel on the ground of laches. This follows from two settled principles of law:

First, the well-established doctrine, not contested by Petitioner, that the question of laches is addressed to the sound discretion of the trial court and that such court's decision on that issue will not be disturbed on appeal unless so clearly wrong as to constitute abuse of discretion. *The Kermit. Lamborn et al vs. American Ship and Navigation Corp. et al*, 76 Fed. 2d 363 (C.C.A. 9th 1935). See also *The Kanto Maru. Inger A/S*, a *corp. vs. Harada Kisen Kabushiki Kaisha*, 112 Fed. 2d 564 (C. C. A. 9th 1940); *Carter Shipping Co. vs. Bowring, Jones & Tidy*, 281 U. S. 515, 50 S. Ct. 400, 74 L. Ed. 1008 (1930); *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 866, 29 L. Ed. 152 (1885); and

Second, the proposition that where an issue lies within the discretion of the trial court, it of course follows

that it is not for the appellate court to weigh the conflicting considerations which the trial court had for consideration, or to determine for itself how it would rule on such question, but only to determine whether the trial court's decision was so palpably erroneous that it amounted to an abuse of discretion. See *The Kanto Maru*, cited above.

Judicial action involving "discretion," which is the power exercised by courts to determine questions to which no strict rule of law is applicable but which from their nature and circumstances are controlled by the personal judgment of a court, is final and cannot be set aside on appeal except when there is a clear abuse of discretion. There is an abuse of discretion when the judicial action is arbitrary, fanciful, or clearly unreasonable, which means that if reasonable men could differ regarding the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Delno vs. Market St. Ry. Co. et al*, 124 Fed. 2d 965 (C. C. A. 9th Circuit 1942). Where an issue is within the discretion of the trial court, it of course follows that it is not for an appellate court to weigh the conflicting considerations which the trial court had for consideration, or to determine for itself how it would rule on such question, but only to determine whether the trial court's decision was so palpably erroneous that it amounts to an abuse of discretion. See *The Kanto Maru*, cited above. Respondent urges that the District Court quite correctly dismissed the case on the ground of laches, and that the Court of Appeals correctly affirmed, apart from the consideration that the trial Court's ruling was required to be sustained unless it amounted to a clear abuse of discretion, and that in any event, the trial Court's ruling most certainly did not constitute abuse of discretion.

The injuries alleged by Petitioner were alleged to have been sustained on December 3, 1947, and the libel in the case below was not filed until October 19, 1949, more than a year and ten months after the date of the alleged injuries. It is established that Limitations barring an action for personal injury run from the time of injury or breach of duty. *Goodall vs. Sartin*, C. C. A. Tenn., 141 Fed. 2d 427, cert. den. 65 S. Ct. 34; *Finck vs. Albers Super Markets*, C. C. A. Ky., 136 Fed. 2d 191; *Hilliard vs. Pennsylvania R. Co.*, C. C. A. Ohio, 73 Fed. 2d 473, cert. den. 294 U.S. 721, 55 S. Ct. 548, 79 L. Ed. 1253. It is clear, then, that any action at law based upon the injuries alleged to have been sustained in the present libel would be barred because of the provision of subsection 3 of section 87 of title 4, Canal Zone Code, prescribing a one-year period of limitation for injuries to one caused by the wrongful act or neglect of another, which reads as follows:

"87. *Within one year.*—Within one year:

* * * * * * * *"

> 3. An action for libel, slander, assault, battery, false imprisonment, seduction, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check.
>
> * * * * * * * *"

Petitioner's decision to sue in admiralty rather than at law, notwithstanding the right to jury trial would be lost thereby, can only have been taken in the hope of avoiding the bar of such limitation.

As aforesaid, Petitioner does not contest that the question of whether or not a libelant is guilty of laches lies within the sound discretion of the admiralty trial court. In the exercise of such discretion, however, the courts are guided by certain well-established principles. One of these is that, as a general rule, an admiralty

court will adopt by analogy the statute of limitations of the State in which the suit in admiralty is brought. *Hughes vs. Roosevelt*, 107 Fed. 2d 901, (C. C. A. 2d 1939); *Frame vs. City of New York*, 34 Fed. Supp. 194 (DC SD NY 1940); *Pope vs. McGrady Rodgers Co.*, 70 Fed. Supp. 780 (DC Penn. 1947), affirmed 164 Fed. 2d 591 (C. C. A. 3d 1947); *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551 (C. C. A. 2d 1930); *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200 (C. C. A. 9th 1934); *Southard vs. Brady*, 36 Fed. 560 (CC NY); *Scull vs. Raymond*, 18 Fed. 547 (DC SD NY); *Davis vs. Smokeless Fuel Co.*, 182 Fed. 1004 (DC NY 1910) affirmed, *Davis vs. Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2d 1912).

Particularly strong reasons exist in a libel in personam for personal injuries, such as this is, for following the common law limitation. In such cases, barring highly exceptional circumstances, the common law limitation will be followed by courts sitting in admiralty because, since libelant has a right to sue at common law, as well as in admiralty, it would be inconsistent to permit him to sue in admiralty with the same effect as at common law, after his right to sue at common law is barred. *McGrath vs. Panama Railroad Co.*, 298 Fed. 303; *Pope vs. McGrady-Rodgers Co.*, 70 Fed. Supp. 780, affirmed 164 Fed. 2d 591; *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551; *Westfall Larson & Co. et al vs. Allman-Hubble Tug Boat Co. et al*, 73 Fed. 2d 200, 203. The same principle is applied in equity, where it is well established that where equitable and legal remedies are concurrent, a litigant may not enlarge the time within which to assert his remedy by electing to proceed in equity, since the limitation at law governs the court of equity. *Union Mut. Life Ins. Co. vs. Friedman*, 139 Fed. 2d 542, reversing 50

Fed. Supp. 278, citing cases for that proposition at page 545; *Goldboss vs. Reiman et al*, 55 Fed. Supp. 811, 819; *Bernstein vs. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maalschappy* (Chemical Bank & Trust Co., third party defendant), 76 Fed. Supp. 335, 346.

It is submitted as significant on the question of how far the analogy of the limitations at law should be followed in admiralty, that the Congress, in legislative enactments in maritime matters, and particularly in the personal tort field, has seen fit to establish fixed periods of limitation rather than relying upon the concept of laches. E. g.: Act of March 30, 1920, ch. 111, 41 Stat. 537 (46 U. S. C. 761 et seq.), providing a right of action for wrongful death on the high seas, which establishes a two-year period of limitations; Act of June 5, 1920, sec. 33, 41 Stat. 1007 (46 U. S. C. 688) (Jones Act).

It is submitted that the above cited *McGrath* case is persuasive in its reasoning, and that the District Court and the Court of Appeals were entirely correct in considering the case, decided by the Court of Appeals for the Fifth Circuit on appeal from the United States District Court for the District of the Canal Zone, as controlling on the question of laches. The facts in the *McGrath* case are in all pertinent respects analogous to those involved in the present case. In that case, the libelant, one Anna McGrath, sought to recover damages alleged by her to have been caused by injuries received by her while a passenger on one of this Respondent's steamships, while making a voyage between New York and the Canal Zone. The libel was dismissed by the then judge of said District Court expressly on the ground of laches, it having been filed 40 days after the expiration of a year from the date of the injury. On appeal to the Court of Appeals, the decision of the lower court was affirmed, the Court's

decision on that point reading as follows [298 Fed. 303]:

> "The applicable statute of limitations for actions at common law for personal injuries in the Canal Zone is one year from the date of the injury. The limitation of three years, which obtains under the Code of Colombia, was superseded by the repealing clause of the legislation and executive orders, which put into effect the Canal Zone Code of Civil Procedure. Courts of Admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. *In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred.*" (Emphasis added.)

In a case such as the present one, injury to respondent is presumed from delay in commencing suit beyond the statutory period in common law actions, since when an admiralty court adopts the statutory period it also adopts the presumption of injury until the contrary is shown. *McGrath vs. Panama Railroad Co.*, 298 Fed. 303; *Pope vs. McGrady-Rodgers Co.*, 70 Fed. Supp. 780; *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200, 203; *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551, 552; *California Casualty Indemnity Exchange et al vs. United States et al*, 74 Fed. Supp. 408, 410; *Redman vs. United States*, 176 Fed. 2d 713, 715; *Redman vs. United Fruit Co.*, 185 Fed. 2d 553 (C. A. 2d C. 1950). In the *McGrath* case the appellate court held on that point as follows:

> "The appellant suggests that no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury, until the contrary is shown. * * * ."

Redman vs. United Fruit Co., which appears to be the latest reported expression of the Court of Appeals for the Second Circuit on this point, holds in effect that before a court in admiralty may refuse to follow the local statute of limitations, libelant's evidence must clearly rebut the presumption of detriment to respondent which results from libelant's delay.

Petitioner appears to contend, in effect, that the District Court did not exercise its discretion on the question of laches, and that instead, it considered itself bound by the one-year statute of limitations per se. Such a contention strikes Respondent as novel indeed, since not even Respondent contended at any time, nor does it now contend, that the one-year statute of limitations applies per se. While the District Court's opinion of April 3, 1950 [R. p. 19] contains some apparently conflicting language, it cannot be assumed that the Court concluded that the one-year statute of limitations applied per se, since not even Respondent urged that it did, at any time. It is submitted that the basis of the Court's decision, and the conclusion that the Court did exercise its discretion, are clearly apparent from the Court's opinion where the Court [R. p. 22], after having stated its conclusions, states that:

> "The above reasoning is supported by the case of *McGrath vs. Panama Railroad Company*, an opinion of the Fifth Circuit Court of Appeals, * * * "

and then proceeds to quote at length from the decision in said *McGrath* case.

Also pertinent is the language of the Court's judgment of April 6, 1950 [R. p. 34] from which it clearly appears that the Court was sustaining *Respondent's* defense of laches on the *grounds urged by Respondent.* The Court of Appeals clearly regarded the District Court's decision as having been made "on the authority of *McGrath v. Panama Railroad Co.*, 298 Fed. 551 * * * " [R. p. 32].

The District Court and the Court of Appeals in the case at bar having adopted the *ratio decidendi* of the *McGrath* case, it must be considered that the decisions of the District Court and of the Court of Appeals were founded on and reached by the same analysis as governs the decision in *McGrath*; in other words, that, in the case at bar, the District Court, in the exercise of its admitted discretion, and after a full consideration of all evidence Libelant below was able to produce which would tend to indicate exceptional circumstances justifying the delay and rebutting the presumption of injury to Respondent from delay, concluded from all the facts and circumstances that there was not made out a case strong enough to excuse the delay or rebut the presumption of injury to Respondent resulting from delay, and accordingly dismissed the libel on the ground of laches, particularly since this case, like the *McGrath* case, was the case of a libel in personam for the recovery of damages for personal injuries, in which the reason for following the limitations of the common law in courts of admiralty is particularly strong by reason of the fact that there is preserved to the libelant in such a case, the right to sue at common law as well as in admiralty, so that it would be inconsistent to permit him to sue in admiralty, with the same effect as at common law, after his right to sue at common law had been barred. The Court of Appeals, following the rationale of its earlier decision in *McGrath*, merely held

that the District Court had not abused its discretion in dismissing the libel on the ground that it was barred by laches. In this decision, as in the *McGrath* case, the Court of Appeals did not hold that *no* type of special circumstance would justify a court in departing from the analogy of the statute of limitations at law, but only that, under the circumstances of this case, the District Court did not abuse its discretion in holding that no such departure was warranted.

It is submitted that the rationale of the *McGrath* case, which as aforesaid, must be deemed to form the basis for the decision of the Court below, is clearly sound and that the *McGrath* case is indistinguishable in any pertinent respect from the case at bar.

The cases cited by Petitioner on the issue of laches, in so far as they are pertinent to that issue as involved in this case, are distinguishable. The case *John M. Young, Appellant vs. The Steamboat Key City, et al* (U. S. 1872) 14 Wall. 653 [Petitioner's Brief, p. 7], is not pertinent to the issue before the Court, inasmuch as that case involved the question of a maritime lien arising out of injury to *property* and *was not a suit for personal injuries*, as is the present suit. As is developed hereinbefore, suits for personal injuries constitute a special class of admiralty suit, which calls for greater adherence by the courts to the statute of limitations, in the absence of highly exceptional circumstances, since it would be inconsistent to permit a libelant to sue in admiralty with the same effect as at common law after his right to sue at common law had been barred.

Petitioner relies upon *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 622 (C. C. A. 2d 1915), which it represented by implication as being the law of the Court of Appeals for the Second Circuit, and with which the decisions in the instant case were stated to be in conflict, in its

petition for certiorari. In the *Lincoln* case Libelant, a seaman (bargemaster), brought suit for injuries sustained by him as a result of a discharge of steam from the side of a vessel. The libel was served four years, seven months and 15 days after the cause of action arose; the analogous statute of limitations at law was three years. Another statutory provision which the court found pertinent, sec. 405 of the Code Civ. Proc. N. Y., was quoted by the court as follows [221 Fed. at 624]:

> "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; that plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

The court in *Lincoln* stated the general rule respecting the analogy of common law limitations in determining the question of laches, and framed the issue involved in that case, in the following language [221 Fed. at 624]:

> "The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations. Southard v. Brady (C. C.) 36 Fed. 560; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381. The libel having been filed more than a year and a half after the period fixed by the statute had expired, the question presented is whether the circumstances are *so exceptional* as to justify the court in holding that there was no such laches as to her relief. The respondent contends that there is nothing exceptional in the facts, and

that libelant's laches has been such as to put the case out of court." [Emphasis added]

The chronological development of that case was stated by the court to have been as follows [221 Fed. at 624]:

> "It appears that within two years after the accident an action at law was begun in the United States Circuit Court of the Southern District upon the assumption that Fill was a citizen of New Jersey and that a diversity of citizenship existed. It was supposed that Fill had become naturalized. This was found to have been error, and the common-law action was dismissed, without any investigation of the merits, on the ground that both plaintiff and defendant were citizens of Great Britain. The dismissal of the action was by the judgment of the Court expressly stated to be without prejudice to the plaintiff's right to proceed in admiralty. The action was submitted by stipulation of the facts on the question of jurisdiction and citizenship only, and was decided by the court without a jury on April 22, 1913. The libel was filed 14 days after the judgment of dismissal in the common-law case. *In substance this was merely a transfer of the controversy from the common-law to the admiralty side of the same court*; the Circuit Court having merged in the District Court January 1, 1912." [Emphasis added]

It is submitted that the court's characterization of that case as being "in substance * * * merely a transfer of the controversy from the common-law to the admiralty side of the same court" is significant, when contrasted with the circumstances of the case at bar, where the action at law brought by Petitioner immediately prior to the filing of the present libel against this Respondent was brought against a different defendant, the United States, under the Tort Claims Act.

On the factual circumstances quoted above, the court in the *Lincoln* case made the following conclusion of law [221 Fed. at 624, 625]:

> "Without going further into the matter, the *conclusion we have reached is that the circumstances may be regarded as exceptional*, and that libelant's conduct does not amount to laches, *especially in view of section 405, supra.*" [Emphasis added]

The court in *Lincoln* was doubtless also influenced by the further consideration that the libelant in that case was a seaman (bargemaster) and was therefore disposed to consider his case exceptional, under the well established rule, still in force and effect, that seamen, who historically were often ignorant of their rights, are the wards of admiralty. *Johnson vs. United States*, 186 Fed. 2d 120, 125 (C. A. 4th C. 1950). No such considerations apply in the case at bar.

Petitioner places considerable reliance upon *Holmberg vs. Armbrecht*, 327 U. S. 392, 66 S. Ct. 582 [Petitioner's Brief, p. 9]. Certiorari was granted in that case because it involved a question of enforcing liability under Federal equitable enactments. The Court of Appeals for the Second Circuit had held, relying on *Guarantee Trust Co. vs. York*, 326 U. S. 99, 65 S. Ct. 1464—which held that when a state statute bars recovery of a suit in a state court on a state-created right, it likewise bars recovery of such a suit on the equity side of a Federal court brought there only because it was between citizens of different states—that a New York statute of limitations was controlling and that the mere lapse of 10 years barred the action. This Court reversed on the ground that the *York* case did not control cases where Federal equitable enactments rather than state-created rights were involved. The case did not decide the question of whether Petitioner was guilty of laches, this Court expressly leaving that question for determination by the Court of Appeals on remand. The facts in *Holmberg* involved elements of fraud which gave rise to the Federal equitable doctrine which is read into every Federal statute of limitations, that time

would not begin to run even under a statute of limitations until such time as petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception which formed the basis for the suit. It is respectfully submitted that there is nothing in *Holmberg* which is inconsistent with the decisions rendered in the case at bar. The holding therein was limited to a decision that the *York* case was inapplicable to the enforcement of Federal equitable rights.

It is submitted that nothing in the holdings of the additional cases cited and relied upon by Petitioner is inconsistent with the holdings of the District Court and of the Court of Appeals in the case at bar.

Conclusion on Second Issue

Respondent respectfully submits that the District Court clearly did not abuse its discretion in dismissing the suit on the ground of laches and that the judgment of the Court of Appeals affirming such dismissal was not clearly erroneous and must therefore be affirmed.

WHEREFORE, on the conclusions reached on both issues involved, Respondent respectfully requests that the judgment of the Court of Appeals of December 14, 1950 [R. p. 33], be affirmed, and that the costs of this review be awarded against Petitioner.

Respectfully submitted,

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